Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

FAIR; FIRST ASSEMBLY OF GOD OF VENTURA, JAMES W. WILLIAMS, III; R.H. SMITH FAMILY PARTNERSHIP; LEAVENS RANCHES; ROBERT TOBIAS; STEPHEN TOBIAS; J.D. McGRATH FARMS; HOWARD AND HOWARD RANCH; DANIEL CAMPBELL; ITO FARMS, THE CONTRERAS FAMILY; and HIJI BROS.,

Petitioners,

v.

CITY OF SAN BUENAVENTURA; and the CITY OF SAN BUENAVENTURA CITY COUNCIL,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District After Denial Of Review By The California Supreme Court

PETITION FOR WRIT OF CERTIORARI

RONALD A. ZUMBRUN
*JOHN H. FINDLEY
**Counsel of Record*
ZUMBRUN & FINDLEY
2150 River Plaza Drive, Suite 255
Sacramento, California 95833
Telephone: (916) 641-0015

Attorneys for Petitioners

57 pp

QUESTIONS PRESENTED FOR REVIEW

A. Whether a city ordinance that permits all property owners, except owners of agricultural property, to obtain general plan redesignation of their property by the city council, but requires owners of agricultural property, and only those property owners, to submit the issue of general plan redesignation of their property to the electorate through the initiative process violates the equal protection and due process rights of those property owners.

B. Whether a city ordinance that excludes owners of agricultural property residing outside the city limits but within the city's planning area from voting on the land use designation of their property violates the voting, equal protection, and due process rights of those property owners.

C. Whether a city ordinance that requires a public vote on the use of church land violates the rights of freedom of religion, privacy, equal protection, and due process of law of that church and its members.

PARTIES TO THE PROCEEDING

The parties to this action in the California Court of Appeal, the California Supreme Court and the Ventura County Superior Court were FAIR, First Assembly of God of Ventura, James W. Williams III, James M. Sharp, R. H. Smith Family Partnership, Leavens Ranches, Robert Tobias, Stephen Tobias, J. D. McGrath Farms, Howard and Howard Ranch, Daniel Campbell, Ito Farms, the Contreras family, and Hiji Bros. as plaintiffs and appellants and City of San Buenaventura and the City Council of the City of San Buenaventura as defendants and respondents. There are no parent or subsidiary companies.

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OPINIONS BELOW

The decision of the California Court of Appeal, Second Appellate District, Division Six, is not reported and is reproduced as Appendix A. Page references are to the version in the Appendix. The opinion of the California Supreme Court denying review is not reported and is reproduced as Appendix B. The opinion of the Ventura County Superior Court is not reported and is reproduced as Appendix C.

JURISDICTION

The decision of the California Court of Appeal was entered June 9, 1997. The decision of the California Supreme Court denying review was entered August 20, 1997. The petition for writ of certiorari has been timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall ... deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant portions of the Internal Revenue Code, 26 U.S.C. §§ 501(c) and 501(h) are excerpted in Appendix D.

STATEMENT OF THE CASE

On November 7, 1995, the voters of the City of San Buenaventura (City) approved Measure I, an initiative entitled Agricultural Lands Preservation Initiative by a margin of 52% to 48%. Appellants' Appendix in Lieu of Clerk's Transcript (AA) 11. The provisions of Measure I were enacted as Ordinance No. 95-33, effective December 7, 1995. AA 33-39. The initiative measure and enacting ordinance are referred to herein collectively as Measure I.

Measure I purports to enact amendments to the City Comprehensive Plan (Comprehensive Plan) in order to prohibit any land use change or redesignation of any property presently designated "Agricultural Use" under the Comprehensive Plan until December 31, 2030, except pursuant to the very limited exceptions specifically provided for in Measure I. The Comprehensive Plan is the general plan of City. AA 11. Measure I prohibits any change in properties designated "Agricultural Use" unless (1) the change is adopted by a vote of the City's voters or (2) the property is redesignated by the City of San Buenaventura City Council (City Council) under the very limited exceptions and circumstances set forth in Measure I. ***Id.***

The findings that Measure I requires of the City Council in order to redesignate land presently designated "Agricultural Use" are so arbitrarily restrictive that the City Council will not lawfully be able to make such findings. For

example, it would be impossible for the City Council to find that petitioners' property currently designated "Agricultural" ***is proven to be unsuitable for any form of agriculture*** as required by Measure I's Section 1.H. The term "unsuitable for any form of agriculture" is so broad that it excludes every parcel currently designated "Agricultural" from redesignation. Measure I's required findings do not address other proper legislative reasons for changing agricultural uses to other uses on land where such other use is appropriate and further inhibits the City Council from balancing different planning interests as changing circumstances may require. AA 12-13.

Measure I's substantive effect is to prohibit necessary development and thereby deprive property owners, including all petitioners, and local communities from providing necessary urban facilities such as housing, churches, and schools to the community.

Petitioner FAIR (Farmers, Families & Friends Against Irresponsible Regulations) is an unincorporated association of residents and property owners in Ventura County, California. Some members of FAIR are residents of City. Some members of FAIR are residents of unincorporated areas of the County of Ventura (County) that are located outside the City limits but within the area of the Comprehensive Plan Land Use Plan Map of said City. Some members of FAIR reside elsewhere in Ventura County or outside the County. AA 2. Petitioners First Assembly of God of Ventura, James W. Williams, III, R. H. Smith Family Partnership, Leavens Ranches, Robert Tobias, Stephen Tobias, J. D. McGrath Farms, Howard and Howard Ranch, Daniel Campbell, Ito Farms, Contreras family, and Hiji Bros. are individual members of FAIR. AA 3-10.

Petitioners filed their Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief (Complaint) in the Superior Court of Ventura County, California, on March 5, 1996. AA 1. The first cause of action of said complaint alleged, among other things, that Measure I and the amendment to City's general plan enacted thereby violated petitioners' voting rights under the Fourteenth Amendment to the United States Constitution, Complaint ¶ 34. The second cause of action alleged violation of petitioner First Assembly of God's rights of freedom of religion, privacy, equal protection, and due process of law. Complaint ¶¶ 41-42. The third cause of action alleged violation of all petitioners' rights of equal protection and due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. Complaint ¶ 48, AA 1-31. Respondents filed a demurrer, AA 45, which was sustained without leave to amend[1] on July 31, 1996, AA 483. Judgment was entered on July 31, 1996. AA 487. The trial court ruled as to the first cause of action: "Cities may legitimately restrict participation in municipal elections to city residents. (***Holt Civic Club v. Tuscaloosa*** (1978) 439 U.S. 60, 68-69....) Petitioners have not alleged, and cannot allege, facts with respect to Measure I sufficient to require extending the right to vote in city elections to non-city residents." App. C-3. As to the second cause of action the trial court ruled:

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[1] Under California law, for purposes of testing the sufficiency of a cause of action, a demurrer admits the truth of all material facts properly pleaded. ***Serrano v. Priest***, 5 Cal. 3d 584, 591 (1971). Further, the allegations of the complaint are to be construed liberally with a view to substantial justice between the parties. Cal. Code of Civ. Proc. § 452.

> "First Assembly of God of Ventura ('Church') has failed to allege facts sufficient to show a violation of its rights to equal protection, free exercise of religion, and privacy. Church cannot allege facts sufficient to show a violation of its right to free exercise of religion because Measure I is a 'valid and neutral law of general applicability.' (***See Employment Division v. Smith*** (1990) 494 U.S. 872, 879....) Church has not alleged, and cannot allege, facts showing that, with respect to Measure I, Church has been treated differently than any other landowner subject to the City's General Plan and, thus, it cannot state a claim for violation of its equal protection rights. Finally, Church cannot state facts sufficient to show a violation of its privacy rights because Measure I does not intrude into 'private areas of individual lives.' (***City of Los Altos v. Barnes*** (1992) 3 Cal.App.4th 1193, 2101.)" App. C-3-4.

The trial court ruled as to the third cause of action that petitioners failed to show violation of their equal protection and due process rights. "Planning and zoning routinely impose different requirements upon different categories of land. ***See, e.g., Studen v. Beebe*** (6th Cir. 1978) 588 F.3d 560, 565.) Petitioners have not alleged, and cannot allege, that Measure I's special treatment of agricultural land within its planning area is irrational or fails to advance a legitimate governmental interest. (***See, Kawaoka v. City of Arroyo Grande*** (9th Cir. 1994) 17 F.3d 1227, 1234.)" App. C-4.

On appeal, petitioners raised the issue of the denial of their right to vote as an infringement of their Fourteenth Amendment due process and equal protection rights in their

opening brief at 6-16. The California Court of Appeal rejected petitioners' argument, quoting ***Holt Civic Club v. Tuscaloosa***, 439 U.S. 60, 68-69 (1978), for the principle that "'a government unit may legitimately restrict the right to participate in its political process to those who reside within its borders.'" App. A-6.

Petitioner Church raised the issue of denial of free exercise of religion under the First Amendment to the United States Constitution, denial of the right of privacy and denial of equal protection of the laws in its opening brief on appeal at 16-30. The Court of Appeal rejected these argument holding that the Church's

> "allegation that Measure I subjects the Church's teachings to popular referendum is not an allegation of fact but a conclusion born of pure speculation. ... The allegation is belied by the terms of Measure I. The measure calls for nothing other than a vote on a land use designation. It does not call for a vote on anyone's religious beliefs. It does not infringe in any respect on the free exercise of the Church's religion." App. A-9.

As to the right of privacy, the court held: "The contention is based on the theory that Measure I puts the Church's religious beliefs to a popular vote. The theory is without foundation. Nor does Measure I compel the Church to engage in any political activity. The decision whether to pursue a change in the land use designation is entirely up to the Church." App. A-10. The court also rejected Church's equal protection argument, holding: "But the Church cites no authority that requires a city to formulate land use planning policies with an eye toward the tax status of individual landowners. If the Church believes the tax laws

leave it at a disadvantage, its argument is with the tax laws, not Measure I." App. A-11.

Petitioners raised their due process and equal protection arguments on appeal in their opening brief at 30-34. The Court of Appeal rejected these arguments, stating: "Thus, it is reasonable to single out agricultural land for special treatment that makes it more difficult to change its classification. Measure I does not deny FAIR members equal protection or due process rights." App. A-12. The California Supreme Court denied review on August 20, 1997, without opinion. App. B-1.

REASONS FOR GRANTING THE WRIT

This case raises important federal constitutional issues that have not been, but should be, settled by this Court. Supreme Court Rule 10(c). Petitioners alleged in their Complaint that the amendments to the City's general plan violated their right to equal protection and due process of law, their constitutional right to vote, their right to freedom of religion and privacy laws as more fully set forth below. AA 1-31. These violations will continue unless and until restrained by the courts. Because of the great public importance of these issues, this Court is urged to order review of the lower court decisions denying petitioners relief.

ARGUMENT

I

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO DECIDE IF ONE CLASS OF PROPERTY OWNERS MAY BE DENIED THE RIGHT GRANTED TO ALL OTHER PROPERTY OWNERS TO CHANGE THE LAND USE DESIGNATION OF THEIR PROPERTY WITHOUT SUBMITTING IT TO THE ELECTORATE

A. Measure I Violates Petitioners' Right to Equal Protection and Due Process of Law

Petitioners alleged that Measure I, in denying the owners of agricultural property the ability possessed by all other property owners to change the designation or use of their property without resorting to the initiative process, deprives petitioners of equal protection of the law and due process of law as guaranteed to them by the Fourteenth Amendment to the United States Constitution. AA 19, Complaint ¶ 48. Petitioners are not challenging the City's right to zone property as "Agricultural Use." Petitioners challenge the requirement that only owners of agriculturally designated property are forced to go through the initiative process to get their property redesignated. AA 18-19, Complaint ¶¶ 46-47.

The Court of Appeal found no denial of equal protection or due process rights in that the need for the long-term protection of agricultural land has been recognized both

by the Legislature and by this Court. "Thus, it is reasonable to single out agricultural land for special treatment that makes it more difficult to change its classification." App. A-12. The Court further found: "That the city council is prohibited from considering other proper legislative planning issues as reasons for changing the agricultural designation of land does not violate due process." App. A-13. This ruling raises a substantial constitutional issue that requires settlement by this Court.

While the police power grants City discretion in enacting general plan and zoning legislation, "[t]he governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited ...." ***Nectow v. City of Cambridge***, 277 U.S. 183, 188 (1928). The due process and equal protection clauses are the chief limitations on the exercise of the police power. As this Court held in ***Moore v. City of East Cleveland***, 431 U.S. 494, 507 (1977): "[T]he zoning power is not a license for local communities to enact senseless and arbitrary restrictions ...."

The thrust of ***Moore*** is that a land use ordinance is invalid if it is arbitrary, discriminatory, unreasonable, oppressive, not substantially related to the public health, safety, or welfare, or only marginally serves legitimate purposes while infringing on personal interests protected under due process standards. While the wisdom of a land use ordinance is not a judicial concern, the reasonable relation of the ordinance to the perceived problems is. When a city undertakes intrusive and selective regulation of the otherwise lawful use of property, the usual deference to the legislative body is inappropriate. ***Id.*** at 499. That is the precise issue here with City singling out owners of agricultural property and imposing on them the unique

requirement to obtain redesignation of their property through the initiative process.

This Court addressed the due process requirements of municipal zoning schemes in the seminal land use case of ***Euclid v. Ambler Realty Co.***, 272 U.S. 365 (1926). This Court there held that a property owner can challenge a zoning restriction if the measure is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." ***Id.*** at 395. If the substantive result of a land use scheme is arbitrary and capricious, bearing no relation to the police power, then the fact that the voters of City enacted it would not salvage the initiative. As this Court held in invalidating a charter amendment enacted by referendum:

> "The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed. Even though Akron might have proceeded by majority vote at town meeting on all municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group ***by making it more difficult to enact legislation in its behalf*** than it may dilute any person's vote or give any group a smaller representation than another of comparable size." ***Hunter v. Erickson***, 393 U.S. 385, 392-93 (1969) (emphasis added).

Here, all property owners other than agricultural property owners are permitted to exercise the privilege of obtaining a redesignation of their property without having to resort to the initiative process. AA 18-19, Complaint ¶¶ 46-48.

This Court held in ***Lucas v. South Carolina Coastal Commission***, 505 U.S. 1003, 1027 n.14 (1992), that

> "a regulation specifically directed to land use no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions."

There is no rational basis to single out one class of property owners and require them to expend greater time and resources than any other class of property owners in order to receive a redesignation of their property. Petitioners, therefore, seek the remedy set forth in ***Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City***, 473 U.S. 172, 196 (1985):

> "The remedy for a regulation that goes too far, under the due process theory, is not 'just compensation,' but invalidation of the regulation, and if authorized and appropriate, actual damages."

B. Measure I Violates Petitioners' Voting Rights

Petitioners' First Cause of Action alleged that certain members of FAIR, including but not limited to petitioners Williams, Campbell, and Contreras, reside, and are the owners of property designated for agricultural use, outside the City limits but within the area of City's Comprehensive Plan Land Use Plan Map. Measure I prohibits these petitioners from obtaining a redesignation or change of use of their property except through a vote of the public or by meeting other conditions of Measure I which none of these petitioners can meet. Because they are not residents of City, these petitioners were not permitted to vote on the adoption

of Measure I and will not be permitted to vote on any initiative that proposes changes to the agricultural use designation or use of their property. AA 14-15, Complaint ¶¶ 28-34. Petitioners further alleged that City's denial of the right to vote on the designation, redesignation, or change of use of their property is an infringement of the rights of these petitioners to equal protection of the law and due process of law under the Fourteenth Amendment to the United States Constitution. AA 15, Complaint ¶ 34.

Collier v. Menzel, 176 Cal. App. 3d 24, 32 (1985), sets a strict scrutiny standard for denial of voting rights:

> "The right to vote on an equal basis with other citizens is a fundamental right in our democratic society and one of the basic civil rights of man which preserves all other rights. Classifications denying this right deserve the strictest scrutiny. Under this stringent standard, the government must not only demonstrate that it has a compelling public interest in utilizing the classification, it must also show that the classification is necessary to serve its objectives." ***Id.*** (citations omitted).

Here, City cannot survive strict scrutiny because it cannot show that excluding property owners from voting on the land use of their own property is necessary to serve the objectives set forth in its general plan. ***Collier*** neatly summed up petitioners' position, holding that "a governmental entity is not justified in excluding ***otherwise qualified voters*** who have no way of making themselves eligible to vote." ***Id.*** at 33 (emphasis in original).

The Court of Appeal rejected petitioners' claims, relying on ***Holt Civic Club v. Tuscaloosa***, 439 U.S. 60.

App. A-7. In ***Holt***, plaintiffs challenged the validity of an Alabama statute that extended certain limited police powers of cities to adjoining areas. 439 U.S. at 61. A major distinction from the present case is that the ***Holt*** plaintiffs sought an extension of the voting franchise on an "equal footing" with those residing within the city limits. ***Id.*** at 62-63. In other words, the ***Holt*** plaintiffs wanted the right to vote in all city elections, regardless of the subject matter or whether they would be impacted by the election. The relief sought in the present case is much more limited. Petitioners do not seek the right to vote in any City election except those elections concerning the redesignation of property outside the City limits but within the City planning area. AA 14-15, Complaint at 14-15. Unlike the ***Holt*** plaintiffs, FAIR members are seeking the right to vote only on those matters which directly impact them.

Those having a "special interest" in elections have heightened rights of participation. ***Holt*** phrased it in the obverse in declaring: "[A]t least in the context of special interest elections the State may constitutionally disfranchise residents who lack the required special interest in the subject matter of the election." ***Id.*** at 69. Obviously, FAIR members whose land is being voted upon have the required special interest in the election and may not be constitutionally disenfranchised. ***Holt*** observes that the Equal Protection Clause is violated if the challenged classification "'rests on grounds wholly irrelevant to the achievement of the State's objective.'" ***Id.*** at 71. City has never shown why the exclusion of those persons whose property is being voted upon is necessary or relevant to achieve City's objective. ***Holt*** merely found that the limited extension of extraterritorial authority did not require the extension of the franchise to nonresidents on an "equal footing" with residents for all matters, regardless of how attenuated the impact might be on the nonresidents. ***Holt*** did not address the present

situation of the right to vote only in elections concerning the use of one's own property.

Measure I controls land use of substantial parcels of property outside City's territorial limits because Ventura County functions under the Guidelines for Orderly Development (Guidelines). AA 405-408; 13-14. The Guidelines are a written policy, adopted by Ventura County and the cities of the county, that direct that development must occur within the boundaries of cities. The Guidelines prohibit urban uses such as housing, places of worship, schools, etc., from occurring in unincorporated areas. These uses are mandated, as a matter of local planning law, to be placed in the incorporated areas of cities and their spheres of influence. Policy 3 of the Guidelines states that applicants for land use permits or entitlements for urban uses within a city's sphere of influence shall be encouraged to apply to the City to achieve their development goals and shall be discouraged from applying to the County. Policy 4 of the Guidelines states that the City is primarily responsible for local land use planning and for providing municipal services within its sphere of influence. These policies require petitioners whose property is outside City limits but within City's sphere of influence to apply to City for land use permits. ***Id.***

The Court of Appeal, App. A-4-5, acknowledged FAIR's allegation that the Guidelines direct that development must occur within the boundaries of cities and prohibits urban uses such as housing, places of worship, schools, etc., from occurring in unincorporated areas. These uses are mandated to be placed in the incorporated areas of cities and their spheres of influence. The court further acknowledged, App. A-5, that FAIR points out that the Guidelines encourage applicants for permits for urban uses to apply to the City and not to the County. AA 407. The court

erroneously concluded that these allegations merely show that it is the County's policies that control land use in the area outside the City, not Measure I. App. A-5. To the contrary, the allegations show that Measure I applies within City's sphere of influence and that owners of property within the City's planning area, including the sphere of influence, must apply to the City for land use changes.

The court accepted City's argument that the land use designation only becomes effective if the land is ever annexed by City. App. A-4. Under the policies set forth in the Guidelines, ***supra,*** that is incorrect. But even if it were true, the property owner would be faced with a ***fait accompli***, a result in which the owner's rights were determined by other voters in an election from which the party directly interested was barred. Such a system denies the property owners due process and equal protection of the laws.

II

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO DECIDE IF A CITY MAY SUBJECT A CHURCH'S TEACHINGS TO A POPULAR VOTE

A. Subjecting a Church's Teachings to a Popular Vote Violates the Church's Rights to Freedom of Religion, Privacy, Equal Protection, and Due Process of Law

Petitioners' Second Cause of Action alleged that petitioner First Assembly of God of Ventura (Church) owns approximately 25 acres of property located outside the City limits but presently designated for agricultural use in City's

Comprehensive Plan. AA 16, Complaint ¶ 36. Church submitted an application to City for a comprehensive plan amendment to have said property's land use redesignated so that Church could build a new church and school facility. City notified Church that as a result of the passage of Measure I, unless it can be demonstrated that Church's land is unsuitable for agriculture, among other things, Comprehensive Plan amendments of agricultural use areas are now subject to a vote of the citizens of City. City then informed Church that the option of City Council approval of a Comprehensive Plan amendment would not apply to Church's request and therefore Church would have to place the item on the ballot for action by the voters. AA 16-17, Complaint ¶¶ 37-39.

1. Measure I Denies Church Its Free Exercise of Religion

Church alleges that Measure I violates the First Amendment to the United States Constitution guaranteeing the free exercise of religion. Church alleges that even if an initiative measure redesignating the land use of Church's property qualifies for the ballot, Church is placed in the intolerable position of being subject to a "popularity contest" in which the result of the vote depends not on whether a church and school are an appropriate use for Church's property but whether the electorate approves of Church and its teachings. AA 17, Complaint ¶ 42.

The Court of Appeal characterized these allegations as "not an allegation of fact but a conclusion born of pure speculation." App. A-9. Under California law these allegations were not speculations but allegations of fact. For examples of allegations held to be speculation ***see, e.g., Pillsbury v. Karmgard***, 22 Cal. App. 4th 743, 759 (1994): "Asserting a successor trustee ***could have authorized*** his suit

...." (Emphasis added.) ***Jensen v. Hewlett-Packard Company***, 14 Cal. App. 4th 958, 968 n.6 (1993). "Jensen's counsel speculated that persons ***'may have seen'*** the evaluation...." (Emphasis added.) ***Thor v. Superior Court***, 5 Cal. 4th 725, 745 n.14 (1993), "petitioner asserted that Andrews's actions ***hypothetically threaten security*** ...." (Emphasis added.) In contrast, Church does not allege that the vote ***could, may*** or will ***hypothetically*** depend on whether the electorate approves of the Church or its teaching. Church makes that allegation without conditions. AA 17, Complaint ¶ 42. For purposes of a demurrer, Church's "'ability to prove the allegations, or the possible difficulty in making such proof, does not concern the reviewing court.'" ***People ex rel. Department of Conservation v. Triplett***, 48 Cal. App. 4th 233, 255 (1996). The Court of Appeal erred in labeling such affirmative allegations as speculations.

In ***Employment Division, Department of Human Resources of Oregon v. Smith***, 494 U.S. 872 (1990), Justice O'Connor's quote from ***West Virginia State Board of Education v. Barnette***, 319 U.S. 624, 638 (1943), illuminates what is at issue here:

> "'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to ... freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.'" ***Employment Division***, 494 U.S. at 903 (O'Connor, J., concurring).

In violation of this fundamental principle, Measure I submits the fundamental rights of the Church to build its church edifice and school to a public vote on the Church and its teachings. A less restrictive means is available in allowing Church to make its application for redesignation of its property to the City Council.[2]

2. **Measure I Denies Church Its Right to Privacy**

Church also alleged that Measure I violates its right to privacy. AA 17-18, Complaint ¶ 42. Specifically, Church alleged that Measure I places it in the intolerable position of being subject to a "popularity contest" in which the result of the vote depends not on whether a church and school is an appropriate use for its property but rather whether the electorate approves of Church and its teachings. ***Id.*** This Court observed in ***Thornburgh v. American College of Obstetricians and Gynecologists***, 476 U.S. 747, 772 (1986), "Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government."

United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 764,

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[2] The state regularly exempts religious objectors from laws of general applicability. ***People v. Woody***, 61 Cal. 2d 716, 723-27 (1964), held that Indians who ingest peyote for religious purposes are exempt from California criminal drug laws. Health and Safety Code § 123420(a) exempts doctors and nurses from performing abortions if their opposition is based on religious grounds. Health and Safety Code § 120365 exempts public school students from immunization requirement if their opposition is based on religious grounds.

n.15 (1989), cited Warren & Brandeis, ***The Right to Privacy***, 4 Harv. L. Rev. 193, 198 (1890-1891), for this basic principle: "'The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.... [E]ven if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them.'"

The Court quoted several authorities on the nature of the privacy right. A. Breckenridge, ***The Right to Privacy*** 1 (1970), "'Privacy, in my view, is the rightful claim of the individual to determine the extent to which he wishes to share of himself with others.... It is also the individual's right to control dissemination of information about himself'"; A. Westin, ***Privacy and Freedom*** 7 (1967), "'Privacy is the claim of individuals ... to determine for themselves when, how, and to what extent information about them is communicated to others'"; Project, Government Information and the Rights of Citizens, 73 Mich.L.Rev. 971, 1225 (1974-1975), "'[T]he right of privacy is the right to control the flow of information concerning the details of one's individuality.'" ***Reporters Committee***, 489 U.S. at 764.

That this right of privacy is not limited to individuals was made plain in ***Brown v. Socialist Workers '74 Campaign Committee (Ohio)***, 459 U.S. 87, 91 (1982): "'Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.'" The Court there held: "The right to privacy in one's political associations and beliefs will yield only to a 'subordinating interest of the State [that is] compelling,' and then only if there is a 'substantial relation between the information sought and [an] overriding and compelling state interest.'" ***Id.*** at 91-92.

To similar effect, the right to privacy in one's religious associations and beliefs may be forced to yield only where there is a substantial relation between information on the Church's teachings and an overriding, compelling state interest. City has never shown a compelling state interest in requiring Church to submit its teachings to a popular vote.

3. **Measure I Denies Church Equal Protection**

Church alleged that the requirement that Church submit its application for land use redesignation to a vote of the people violated Church's right to equal protection and due process of law. AA 17-18, Complaint ¶ 42. As a tax-exempt organization under federal law, Church is prohibited from "electioneering," including the gathering of signatures for an initiative and campaigning for the initiative if it qualifies for the ballot. ***Id.*** at 17, Complaint ¶ 41. Federal law denies tax-exempt status to any nonprofit organization that devotes a "substantial" part of its activities toward attempting to influence legislation, including initiatives. Internal Revenue Code § 501(c)(3).

It costs the Church nothing to request the City Council to redesignate the land use of its property. (And indeed, Church has already made such a request, albeit unsuccessfully, AA 16-17, Complaint ¶¶ 37-39.) On the other hand, if Church is forced to mount a campaign to collect signatures for a ballot initiative and pay for the political advertising--whether in newspapers or electronic media--necessary to ensure the success of the initiative, this will be a far more expensive undertaking and will make the Church susceptible to a finding that this political "electioneering" constituted a "substantial" part of its activities. This is prohibited by federal law, ***id.*** at 17, Complaint ¶ 41, specifically by Internal Revenue

Code § 501(c)(3), and would cause Church to forfeit its tax-exempt status. ***Christian Echoes National Ministry, Inc. v. United States***, 470 F.2d 849, 856-58 (10th Cir. 1972).

The Internal Revenue Code allows certain charities to substitute objective limits on political expenditures by electing to be governed by Internal Revenue Code § 501(h). However, this election is not available to churches or other religious organizations. IRC § 501(h)(5). Thus, only charitable organizations run the risk of revocation of their tax-exempt status because of such political participation, and only religious charitable organizations such as Church are unable to protect themselves from such revocation through the election available to other charities under Internal Revenue Code § 501(h). And this deprivation of tax-exempt status may be applied retroactively. ***Christian Echoes***, 470 F.2d at 858.

Church is not challenging the constitutionality of the tax laws. What Church is challenging is Measure I's denial to Church of equal protection of the law in placing it and other religious organizations in a dilemma faced by no other person or entity wishing to redesignate property. Church must either risk its tax-exempt status or forego the right available to every entity except religious ones to mount a vigorous campaign for an initiative to redesignate the land use of its property. This is the essence of denial of equal protection and due process of law.

In ***City of Boerne v. Flores***, __ U.S. __, 117 S.Ct. 2157, 2161 (1997), this Court observed that neutral, generally applicable laws have failed to pass muster when other constitutional protections were at stake. The example given, ***id.***, was ***State of Wisconsin v. Yoder***, 406 U.S. 205 (1972), which invalidated Wisconsin's mandatory school-attendance law as applied to Amish parents who refused on

religious grounds to send their children to school. "That case implicated not only the right to the free exercise of religion but also the right of parents to control their children's education." ***City of Boerne***, 117 S.Ct at 2161. This case implicates not only the free exercise of religion but also the constitutional protections of privacy, equal protection and due process of law. Measure I, in violating Church's rights under each of those protections, fails to pass constitutional muster.

CONCLUSION

For the reasons set forth above, and because of the fundamental constitutional rights at stake, it is respectfully urged that this Court grant this Petition for Writ of Certiorari.

DATED: November 16, 1997.

Respectfully submitted,
RONALD A. ZUMBRUN
*JOHN H. FINDLEY
*Counsel of Record
ZUMBRUN & FINDLEY

2150 River Plaza Drive, Suite 255
Sacramento, California 95833
Telephone: (916) 641-0015

Attorneys for Petitioners

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

COURT OF APPEAL
SECOND DIST.

FILED
JUNE 9, 1997
JOSEPH A. LANE, Clerk

FAIR, etc., et al.,	)	2d Civil No. B105879
	)	
Plaintiffs and Appellants,	)	(Super. Ct.
	)	No. CIV 162842)
v.	)	(Ventura County)
	)	
CITY OF SAN BUENAVENTURA, etc., et al.,	)	
	)	
	)	
Defendants and Respondents.	)	
	)	

This is an action for writ of mandate, injunction and declaratory relief challenging Measure I, a land use initiative passed by the voters of the City of San Buenaventura (hereinafter "City"). The measure, which amends the City's general plan, provides with certain exceptions that lands designated for agricultural use may not be redesignated for other uses without a vote of the City's electorate until 2030.

Measure I is patterned after a similar measure that survived scrutiny by our Supreme Court in *DeVita v. County of Napa* (1995) 9 Cal.4th 763. In *DeVita*, however, the court considered only the validity of a general plan amendment by initiative, the validity of the 30-year term of the measure and the voter approval provisions. The complaint here raises other issues.

Nevertheless, we agree with the trial court that the complaint fails to state a cause of action. We affirm that judgment entered pursuant to the sustaining of the City's demurrer.

FACTS

The voters of the City approved Measure I at the general election on November 7, 1995. The purpose of the measure was to preserve agricultural and other open space lands within the City's planning area. The measure readopted until December 31, 2030, the City's agricultural use designations as defined in the City's comprehensive plan and as set forth on the City's land use plan map of August 28, 1989, as amended through February 1, 1995. Some of the land within the City's planning area lies outside the City boundaries in unincorporated areas of the County of Ventura (hereinafter "County").

Measure I provides, with certain exceptions, that the designation of lands for agricultural use shall not be amended prior to December 31, 2030, unless the amendment is approved by a vote of the people. The exceptions allow the city council to amend the agricultural designation where the land is useless for agriculture or the designation for agricultural use would constitute an unconstitutional taking.

FAIR, an unincorporated association of residents and property owners in the County, filed this action. FAIR is an acronym for Farmers, Families and Friends Against Irresponsible Regulations. Some members of FAIR are residents of the City; some reside elsewhere in the County; and some reside outside the County. Most of the parcels owned by FAIR members are outside the City but within the City's planning area. All are designated for agricultural use under Measure I. The complaint requested that the court declare Measure I to be void and restrain the City from enforcing it.

The City demurred on the ground that the complaint failed to state a cause of action. At the hearing on the demurrer, FAIR's counsel stated the complaint was a facial attack on Measure I. The trial court asked whether if it sustained the demurrer FAIR could amend any allegation to state a good cause of action. FAIR did not request an opportunity to amend. The trial court sustained the demurrer without leave to amend.

DISCUSSION

We treat the demurrer as admitting all facts properly pleaded, but not contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We give the complaint a reasonable interpretation in determining whether it states facts sufficient to constitute a cause of action. (*Ibid.*) We take FAIR's failure to request leave to amend as a concession that an amendment would not be helpful.

I

The first cause of action alleged that Measure I violates voting and equal protection rights of those plaintiffs residing outside the City's boundaries but within the City's planning area. FAIR complains that landowners who reside outside the City were not permitted to vote on Measure I and will not be permitted to vote on any proposed change to the agricultural designation of their properties.

It is well settled that although residents have a constitutional right to vote in municipal elections, nonresident landowners have no such right. (*Curtis v. Board of Supervisors* (1972) 7 Cal.3d 942, 962-963.) FAIR's first cause of action seems not so much concerned, however, with nonresident landowners who own land within the City, but with nonresident landowners who own land outside the City but within the City's planning area. Some of this land is designated for agricultural use in the City's general plan and map that are part of Measure I.

Government Code section 65300 requires each city to adopt a general plan for the physical development of the city "and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning." FAIR's complaint does not allege that the City's general plan readopted by Measure I touches land that bears no relation to the City's planning. Thus, on its face, Measure I does no more than follow the mandate of the Government Code in planning for the use of land outside its current boundaries.

FAIR argues that although the Government Code authorizes the City to plan for land use outside its boundaries, no law authorizes the City to actually regulate

land use outside its boundaries. The City concedes as much. It says that the use designation for land located outside the City is simply a preplanning tool that only becomes effective if the land is ever annexed by the City.

In an effort to show that Measure I actually regulates land outside the City's boundaries, FAIR points to an allegation in its complaint that: "Ventura County functions under the Guidelines for Orderly Development and other land use policies that direct that development must occur within the boundaries of cites [*sic*]. These policies prohibit urban uses such as housing, places of worship, schools, etc., from occurring in unincorporated areas. These uses are mandated, as a matter of local planning law, to be placed in the incorporated areas of cities and their spheres of influence." FAIR also points out that the guidelines for Orderly Development encourage applicants for permits for urban uses to apply to the City and not to the County.

But FAIR's allegation does nothing more than show it is the County's policies that control land use in the area outside the City, not Measure I. Should the County decide to change its policies and allow urban development on agricultural lands outside the City, there is nothing in Measure I to prevent it.

In *Holt Civic Club v. Tuscaloosa* (1978) 439 U.S. 60 [58 L.Ed.2d 292], the Supreme Court discussed extraterritorial statutes and the voting rights of nonresidents. There the court upheld the constitutionality of Alabama's "police jurisdiction" statutes against an equal protection and due process challenge. Those statutes subjected persons residing within up to three miles of a city's limits to the city's police and sanitary regulations and the city's business

licensing powers and gave the municipal courts jurisdiction over prosecutions for breach of a city's ordinances within its police jurisdiction. Persons residing within a police jurisdiction, however, could not vote in the city's elections.

Residents of a police jurisdiction argued the statutes denied them equal protection and due process because they could not vote in the city's elections. In rejecting the argument, the court stated, "[O]ur cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political process to those who reside within its borders." (*Holt Civic Club v. Tuscaloosa, supra*, 439 U.S. at pp. 68-69 [58 L.Ed.2d at p. 301].)

The court distinguished in a footnote, however, "a situation in which a city has annexed outlying territory in all but name, and is exercising precisely the same governmental powers over residents of surrounding unincorporated territory as it does over those residing within its corporate limits." (*Holt Civic Club v. Tuscaloosa, supra*, 439 U.S. at pp. 72-73, fn. 8 [58 L.Ed.2d at pp. 303-304, fn. 8].) The court stated appellants have neither alleged nor proven that the authority exercised by the city within the police jurisdiction is the same as exercised by the city within its corporate limits. The court said that the appellants' list of the city's extraterritorial powers is notable for what it does not include: "the vital and traditional authorities of cities and towns to levy ad valorem taxes, invoke the power of eminent domain, and zone property for various types of uses." (*Ibid.*)

Here the complaint cannot reasonably be construed as alleging that the City exercises "precisely the same governmental powers over residents of surrounding unincorporated territory as it does over those residing within

its corporate limits." (*Holt Civic Club v. Tuscaloosa, supra*, 439 U.S. at pp. 72-73, fn, 8 [58 L.Ed.2d at pp. 303-304, fn. 8].) Measure I has even less effect outside the City's limits than the statutes upheld in *Holt*. Unlike the statutes upheld in *Holt*, Measure I has no actual regulatory effect in the unincorporated areas of the County.

Nevertheless, FAIR tries to distinguish *Holt* by pointing to the court's statement that Tuscaloosa did not have the power to zone property in the police jurisdiction area. But the court pointed to the lack of zoning power simply as one factor showing that the police jurisdiction statutes were not the equivalent of a de facto annexation of territory. The court did not suggest that the power to zone land outside the city limits would by itself constitute a de facto annexation, and, in any event, Measure I does not provide the City with that power.

Nor is Measure I subject to strict scrutiny which places the burden on the City to show that a compelling interest justifies the measure. The court in *Holt* stated, "Our inquiry is limited to the question whether 'any state of facts reasonably may be conceived to justify' Alabama's system of police jurisdictions . . . ." (*Holt Civic Club v. Tuscaloosa, supra*, 439 U.S. at p. 74 [58 L.Ed.2d at p. 304].) "[T]he burden was on appellants to establish a difference in treatment violative of the Equal Protection Clause . . . ." (*Id.*, at p. 72-73, fn. 8 [58 L.Ed.2d at pp. 303-304, fn. 8].) Thus, the court did not apply strict scrutiny to the police jurisdiction statutes in question.

FAIR's reliance on *Hawn v. County of Ventura* (1977) 73 Cal.App.3d 1009 is misplaced. There the court subjected to strict scrutiny a measure that would require the approval

of a city's voters before the county could place an airport within the city. The court held the measure could not survive strict scrutiny because the city's proffered environmental justification was not compelling enough to overcome allowing city voters to "dump" airport problems on disenfranchised county voters.

II

Hawn was decided before *Holt* and may well have been decided differently had the Court of Appeal had *Holt* to guide it. In any event, here, unlike *Hawn*, Measure I does not allow City voters to "dump" anything on the County. Measure I does not prevent the County from designating land in unincorporated areas for whatever use the County deems desirable.

The second cause of action alleged that Measure I violates the rights of freedom of religion, privacy, equal protection and due process of the First Assembly of God of Ventura.

The First Assembly of God (hereinafter "Church") is a church that owns land outside the City's limits. The land is designated agricultural on the City's land use plan map. The church applied to the City for a land use plan amendment to allow the Church to build a new church and school facility. The City informed the Church that it would have to place the item on the ballot for action by the voters.

The Church alleges that Measure I places it in the intolerable position of being subject to a popularity contest. It believes the result of the vote will depend not on whether a church and school is an appropriate use of the land, but on

whether the electorate approves of the Church and its teachings. Thus, the Church concludes Measure I violates the free exercise of religion guaranteed by the United States and California Constitutions. (U.S. Const., 1st Amend.; Cal. Const., art. I, § 4.)

The allegation that Measure I subjects the Church's teachings to popular referendum is not an allegation of fact but a conclusion born of pure speculation. Unlike allegations of fact, we are not bound on demurrer to treat such conclusions as true. (*Blank v. Kirwin, supra,* 39 Cal.3d 311, 318.) The allegation is belied by the terms of Measure I. The measure calls for nothing other than a vote on a land use designation. It does not call for a vote on anyone's religious beliefs. It does not infringe in any respect on the free exercise of the Church's religion.

The Church's reference to the Religious Freedom Restoration Act (RFRA) (42 U.S.C. § 2000bb et seq.) is not helpful. The RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section." (42 U.S.C. § 2000bb-1(a).) Under subsection (b), "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--[¶] (1) is in furtherance of a compelling governmental interest; and [¶] (2) is the least restrictive means of furthering that compelling governmental interest." (42 U.S.C. § 2000bb-1(b).)

Our Supreme Court in *Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143, 1166 described the circumstances under which the RFRA requires the

government to show a compelling interest and use the least restrictive means: "The burden [of a neutral, generally applicable law] must fall on a religious belief rather than on a philosophy or a way of life. (2) The burdened religious belief must be sincerely held. (3) The plaintiff must prove the burden is substantial or, in other words, legally significant. [Fns. omitted.]"

Here, Measure I places no burden on any religious belief. It simply calls for a vote on a land use designation. Moreover, the Church's suggestion that land use decisions for its property be left to the city council is difficult to understand. If the Church is concerned that the voters' decisions about land use may be affected by the Church's religious beliefs, it is difficult to see why the concern does not apply with equal force to the city council.

The Church's argument that Measure I violates Church members' right of privacy is also without merit. The contention is based on the theory that Measure I puts the Church's religious beliefs to a popular vote. The theory is without foundation. Nor does Measure I compel the Church to engage in any political activity. The decision whether to pursue a change in the land use designation is entirely up to the Church.

Nor is there merit to the Church's argument that Measure I denies it equal protection of the law. The Church's equal protection challenge is based on its tax exempt status as a nonprofit organization. The Church points out the Internal Revenue Code denies tax exempt status to a nonprofit organization that devotes a substantial part of its activities toward attempting to influence legislation. (26 U.S.C. § 501(c)(3).) The Church also

points out that, unlike other charitable organizations, a religious institution may not take advantage of an election under Internal Revenue Code section 501(h) that may help insulate it from the charge that its political activities are substantial.

The Church claims it costs it nothing to request the city council to redesignate the land use of its property. If, however, the Church is forced to collect signatures for a ballot initiative and pay for political advertising, the Church claims that its actions may be found to constitute a substantial part of its activities. The Church concludes Measure I denies it equal protection because only charitable organizations run the risk of loss of their tax exempt status and only religious organizations are unable to avail themselves of an election under Internal Revenue Code. (26 U.S.C. § 501(h).)

But the Church cites no authority that requires a city to formulate land use planning policies with an eye toward the tax status of individual landowners. If the Church believes the tax laws leave it at a disadvantage, its argument is with the tax laws, not Measure I.

III

The third cause of action alleged that Measure I violates the due process and equal protection rights of FAIR members. FAIR points out that only owners of agriculturally designated property are forced to go through the initiative process to get their property redesignated. FAIR contends the disparate treatment of agricultural land is without rational basis.

The equal protection clause does not require uniform treatment. (*Norsco Enterprises v. City of Fremont* (1976) 54 Cal. App.3d 488, 498.) Classification of land is allowed if the classification is reasonable. (*Ibid.*) Wide discretion is allowed in making the classification, and every presumption is in favor of its validity. (*Ibid.*) The classification is reasonable if any set of facts can be conceived that would sustain it. (*Ibid.*)

Our Supreme Court stated in *DeVita v. County of Napa, supra*, 9 Cal.4th 763, 791, "[T]he particular need for the long-term protection of agricultural land has been recognized both by the Legislature and by this court." Thus, it is reasonable to single out agricultural land for special treatment that makes it more difficult to change its classification. Measure I does not deny FAIR members equal protection or due process rights.

FAIR complains that the findings required by Measure I in order to allow the city council to change the land use designation from agricultural are arbitrarily restrictive. FAIR points to the requirement of Measure I that the city council must find that the land is "unsuitable for any form of agriculture" before the council can redesignate the land use without a popular vote. FAIR claims the required finding "unsuitable for any form of agriculture" excludes every parcel currently designated as agricultural from redesignation by the city council. FAIR states that the required finding does not address other proper reasons for changing agricultural uses and prohibits the city council from balancing different planning interests.

The exception to the popular vote requirement is not arbitrarily restrictive. The exception is narrowly drawn to

ensure that any redesignation will be by popular vote except where the need for redesignation is quite obvious. That the city council is prohibited from considering other proper legislative planning issues as reasons for changing the agricultural designation of land does not violate due process.

The people have the right to reserve such planning issues for their direct decision. In upholding the constitutionality of a land use referendum in *Eastlake v. Forest City Enterprises, Inc.* (1976) 426 U.S. 668, 672 [49 L.Ed.2d 132,137], the Supreme Court stated: "Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. . . . In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise by [*sic*] assigned to the legislature. [Citation.]"

IV

FAIR contends in its fourth cause of action that Measure I's extraterritorial effect violates article XI, section 7 of the California Constitution. That section provides: "A county or city may make and enforce within its limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws." FAIR cites *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 140 for the proposition that a city's police power can be applied only within its own territory.

But as we have previously stated, Measure I does not purport to apply any police power outside of the City's limits. As applied to land outside the City's limits, it is merely a preplanning tool without legal effect. Such

preplanning for land within a city's zone of influence is mandated by Government Code section 65300 and has been upheld against an attack that it violates article XI, section 7. (City of Irvine v. Irvine Citizens Against Overdevelopment (1994) 25 Cal.App.4th 868, 876-877.) If Measure I has any actual effect outside the City, it is only because County policies give it effect.

V

FAIR alleged in its fifth cause of action that Measure I violated the requirement of Government Code section 65300.5. That section requires that the general plan and its elements to be internally consistent.

FAIR points to that portion of Measure I which states, "The provisions of this initiative shall prevail over any revisions to the City of Ventura's Comprehensive Plan as amended through February 1, 1995, or to the City of Ventura's Land Use Plan Map as amended through February 1, 1995, which conflict with the initiative." FAIR also points to another portion of Measure I which requires the city council to complete such revisions of the comprehensive plan within 180 days "as are necessary to achieve consistency with all provisions of this initiative."

FAIR claims that such a "precedence clause" was ruled unlawful in *Sierra Club v. Board of Supervisors* (1981) 126 Cal.App.3d 698. But FAIR's complaint alleges no actual inconsistency in the City's comprehensive plan. Thus, there is nothing that brings any "precedence clause" into play. In the absence of some allegation of actual conflict, the question of the validity of the clause is purely hypothetical. Courts are not required to decide such

hypothetical questions. (See 3 Witkin, Cal. Procedure, *supra*, § 75, pp. 135-138.)

VI

FAIR alleges in its sixth cause of action that Measure I is an advisory resolution rather than a legislative act. The allegation is based on the portion of Measure I that requires the city council within 180 days to complete such revisions of the comprehensive plan "as are necessary to achieve consistency with this initiative."

The electorate's initiative power is limited to legislation; a resolution is not within the electorate's initiative power. (*American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 714; *Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504, 1510.) Here FAIR does not contest that a general plan amendment is legislative in nature. Nor can FAIR validly contest that Measure I directly amends the general plan. Thus, this case is not like *Marblehead* where the initiative measure did not directly amend the general plan. In *Marblehead* the measure only declared that the general plan should be revised to reflect the "concepts" expressed in the measure. The actual amendment was left to the city council. (*Marblehead v. City of San Clemente, supra*, 226 Cal.App.3d at p. 1510.)

Measure I requires the city council to amend the general plan only if it is necessary to achieve consistency with the initiative. Even if this provision of the measure could somehow be construed as coming within the proscription announced in *Marblehead*, FAIR would not be helped. FAIR's complaint does not allege that any such amendment was made or was required to be made under the

terms of Measure I. FAIR's sixth cause of action at best alleges a hypothetical question. (See 3 Witkin, Cal. Procedure, *supra*, Actions, § 75, pp. 135-138.)

VII

FAIR's seventh cause of action alleges that Measure I prohibits the building of adequate additional housing to accommodate the increasing population of the City and the region. Thus, FAIR alleges Measure I violates the policy of providing adequate and affordable housing set forth in the Government Code. (Citing Gov. Code, § 65009, subd. (a) [declaring a housing crises in California]; § 65302, subd. (a) [requiring a general plan to contain a land use element that includes housing]; § 65580 [declaring the availability of housing to be of vital statewide importance]; § 65913 [declaring a severe shortage of affordable housing].)

First, Measure I does not prohibit any property from being designated for residential use; it merely requires a vote of the electorate to do it.

Second, FAIR points to no law requiring the City to satisfy its need for housing from land designated for agricultural use.

Third, FAIR's allegations ignore the Legislature's policies in favor of preserving agricultural land. (See Gov. Code, § 52100 et seq. [authorizing 10-year contracts between local government and agricultural landowners to preserve agricultural use in exchange for lower property taxes]) and open space (see Gov. Code, § 65302, subd. (e) [requiring general plan to contain an open-space element]; § 65561, subd. (a) [declaring open space necessary to insure the

availability of land for the production of food and fiber]; § 65562 [declaring open space a valuable resource that must be preserved whenever possible].)

Fourth, FAIR does not allege that the current housing element of the City's general plan is inadequate. FAIR's concern appears to be that Measure I might at some time in the future cause the housing element to become inadequate. The court in *DeVita v. County of Napa, supra*, 9 Cal.4th 763, 792-793 rejected such concerns as a basis for invalidating a similar initiative measure. The court stated: "We should not presume--nor, given the rule that doubts should be resolved in favor of the initiative and referendum power, should we assume the Legislature presumed--that the electorate will fail to do the legally proper thing. We see no reason to suppose that, if Measure J at some point causes the Napa County General Plan to become inadequate--a scenario that is by no means inevitable--the electorate will not approve a proper corrective amendment proposed by the board. If, down the road, the electorate fails to act appropriately, courts may then be asked to intervene to remedy deficiencies in the general plan, as they would likely act if the board itself failed to properly revise the general plan."

FAIR's reliance on *Stocks v. City of Irvine* (1981) 114 Cal.app.3d 520 is misplaced. There the court held that plaintiffs who resided outside the city had standing to bring an action challenging the city's alleged exclusionary zoning. Here FAIR's problem is not standing. Its problem is that, apart from standing, the allegations of its complaint fail to state a cause of action.

VIII

The eighth cause of action is for declaratory relief. It is based on the previous seven causes of action. Having concluded that the previous seven causes of action on which it is based are insufficient, it follows that the eighth is also.

The judgment is affirmed. Costs are awarded to respondents.

NOT TO BE PUBLISHED.

GILBERT, J.

We concur:

STONE, P. J.

YEGAN, J.

John J. Hunter, Judge
Superior Court County of Ventura

Zumbrun & Findley, Ronald A. Zumbrun and John H. Findley for Plaintiffs and Appellants.

Amy A. Albano, City Attorney, Daniel P. Selmi, Shute, Mihaly & Weinberger, Rachel B. Hooper and Robert S. Perlmutter for Defendants and Respondents.

Second Appellate District, Division Six,

No. B105879

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
AUG 20 1997

Robert Wandruff Clerk

FAIR, Etc., Et Al., Appellants

v.

CITY OF SAN BUENAVENTURA,
Etc. Et Al., Respondents

Petition for review DENIED.

GEORGE
Chief Justice

PETER BULENS, City Attorney, State Bar #43259
City of San Buenaventura
501 Poli Street
Ventura, CA 93003
Tel: (805) 654-7815

DANIEL P. SELMI, State Bar #67481
Attorney at Law
1441 West Olympic Boulevard
Los Angeles, CA 90015
Tel: (213) 736-1098

RACHEL B. HOOPER, State Bar #98569
JOSEPH E. JARAMILLO, State Bar #178566
SHUTE, MIHALY & WEINBERGER
396 Hayes Street
San Francisco, CA 94102
Tel: (415) 552-7272

Attorneys for Respondents, CITY OF SAN BUENAVENTURA and the CITY OF SAN BUENAVENTURA CITY COUNCIL

VENTURA COUNTY
SUPERIOR AND MUNICIPAL COURTS

FILED
JUL 31, 1996

Sheila Gonzalez, Superior and
Municipal Courts Executive
Officer and Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

FAIR, an unincorporated association; FIRST ASSEMBLY OF GOD OF VENTURA, a church; JAMES W. WILLIAMS, III, an individual; JAMES M. SHARP, an individual; R. H. SMITH FAMILY PARTNERSHIP, a family partnership; LEAVENS RANCHES, a family partnership; ROBERT TOBIAS and STEVEN TOBIAS, individuals; J.D. McGRATH FARMS, a family partnership; HOWARD AND HOWARD RANCH; DANIEL CAMPBELL, an individual; ITO FARMS, a corporation; THE CONTRERAS FAMILY, individuals; and HIJI BROS., a partnership, Petitioners and Plaintiffs, vs. CITY OF SAN BUENAVENTURA, a political subdivision; and the CITY OF SAN BUENAVENTURA CITY COUNCIL, Respondents and Defendants.	Case No. Civ 162842 ORDER SUSTAINING RESPONDENTS' DEMURRER

On July 16, 1996, respondents and defendants CITY OF SAN BUENAVENTURA and CITY OF SAN BUENAVENTURA CITY COUNCIL's (collectively, the "City") demurrer to petitioners and plaintiffs' ("petitioners") petition and complaint came before this court for hearing. The parties having appeared through counsel, the court having reviewed the pleadings and documents on file and heard the argument of counsel and being fully apprised therein,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. The City's demurrer to petitioners' first cause of action is sustained without leave to amend because petitioners have failed to allege facts sufficient to show a violation of their voting rights. Cities may legitimately restrict participation in municipal elections to city residents. (Holt Civic Club v. Tuscaloosa (1978) 439 U.S. 60, 68-69; Collier v. Menzel (1985) 176 Cal.App.3d 24, 33.) Petitioners have not alleged, and cannot allege, facts with respect to Measure I sufficient to require extending the right to vote in city elections to non-city residents.

2. The City's demurrer to the second cause of action is sustained without leave to amend because petitioner First Assembly of God of Ventura ("Church") has failed to allege facts sufficient to show a violation of its rights to equal protection, free exercise of religion, and privacy. Church cannot allege facts sufficient to show a violation of its right to free exercise of religion because Measure I is a "valid and neutral law of general applicability." (See Employment Division v. Smith (1990) 494 U.S. 872, 879; Smith v. Fair Employment and Housing Comm'n (1996) 12 Cal.4th 1143, 1161-62.) Church has not alleged, and cannot allege, facts showing that, with respect to Measure I, church has been treated differently than any other landowner subject to the City's General Plan and thus, it cannot state a claim for violation of its equal protection rights. Finally, Church cannot state facts sufficient to show a violation of its privacy rights because Measure

I does not intrude into "private areas of individual lives." (City of Los Altos v. Barnes (1992) 3 Cal.App.4th 1193, 1201.)

3. The City's demurrer to petitioners' third cause of action is sustained without leave to amend because petitioners fail to allege facts sufficient to show a violation of their equal protection and due process rights. Planning and zoning routinely impose different requirements upon different categories of land. (See e.g., Studen v. Beebe (6th Cir. 1978) 588 F.3d 560, 565.) Petitioners have not alleged, and cannot allege, that Measure I's special treatment of agricultural land within its planning area is irrational or fails to advance a legitimate governmental interest. (See Kawaoka v. City of Arroyo Grande (9th Cir. 1994) 17 F.3d 1227, 1234.)

4. The City's demurrer to petitioners' fourth cause of action is sustained without leave to amend because petitioners have failed to allege facts showing that the City has exceeded its police power under the California Constitution. Petitioners have not alleged, and cannot allege, facts sufficient to support this cause of action because cities may constitutionally plan for areas outside their boundaries. (City of Irvine v. Irvine Citizens Against Overdevelopment (1994) 25 Cal.App.4th 868, 877; Dateline Builders, Inc. v. City of Santa Rosa (1983) 146 Cal.App.3d 520, 531.) Thus, Measure I does not exceed the City's police power.

5. The City's demurrer to petitioners' fifth cause of action is sustained without leave to amend because petitioners have failed to allege facts sufficient to show that Measure I contains an illegal "precedence clause" under Sierra Club v. Kern County Bd. of Supervisors (1981) 126 Cal.App.3d 698. Petitioners' challenge to Measure I's statement that its provisions "prevail over" any amendments to the City's General Plan made between February 1, 1995 and December 7, 1995 (the measure's effective date) is without merit because petitioners have not alleged, and cannot allege, such plan amendments occurred during that time period.

6. The City's demurrer to petitioners' sixth cause of action is sustained without leave to amend because petitioners have failed to

allege facts sufficient to show that Measure I is an illegal advisory measure. Unlike the measure challenged in Marblehead v. City of San Clemente (1991) 226 Cal.App.3d 1504, on which petitioners rely, Measure I directly amends the City's General Plan, specifying both the precise language to be added and the precise location of the amendment within the existing General Plan. Measure I's mechanism for amending the City's General Plan is identical to the approach of Napa County's Measure J, upheld in DeVita v. Napa County (1995) 9 Cal.4th 763.

7. The City's demurrer to petitioners' seventh cause of action is sustained without leave to amend because petitioners have failed to allege facts sufficient to show that Measure I conflicts with state housing law. Petitioners have failed to allege facts sufficient to show that Measure I has caused the City's housing element to fall into noncompliance with state law. Indeed, petitioners cannot allege such facts because Measure I does not amend the City's housing element or reduce the amount of housing available within the City.

8. The City's demurrer to petitioners' eighth cause of action is sustained without leave to amend because petitioners cannot state a cause of action for declaratory relief. Since this cause of action is based upon the allegations of the preceding seven claims and each of those claims fails to state a cause of action for relief, the eighth cause of action fails.

DATED: July 25, 1996.

JOHN J. HUNTER
JUDGE OF THE SUPERIOR COURT

STATUTORY PROVISIONS AT ISSUE

Internal Revenue Code (26 U.S.C.) § 501(c)(3) provides in pertinent part:

"(c) List of exempt organizations.--The following organizations are referred to in subsection (a):

"(3) Corporations ... organized and operated exclusively for religious ... purposes ... no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."

Internal Revenue Code (26 U.S.C.) § 501(h) provides in pertinent part:

"(h) Expenditures by public charities to influence legislation.--

"(1) General rule.--In the case of an organization to which this subsection applies, exemption from taxation under subsection (a) shall be denied because a substantial part of the activities of such organization consists of carrying on propaganda, or otherwise attempting, to influence legislation, but only if such organization normally--

"(A) makes lobbying expenditures in excess of the lobbying ceiling amount for such organization for each taxable year, or

"(B) makes grass roots expenditures in excess of the grass roots ceiling amount for such organization for each taxable year.

....

"(3) Organizations to which this subsection applies.--This subsection shall apply to any organization which has elected (in such manner and at such time as the Secretary may prescribe) to have the provisions of this subsection apply to such organization and which, for the taxable year which includes the date the election is made, is described in subsection (c)(3) and--

"(A) is described in paragraph (4), and

"(B) is not a disqualified organization under paragraph (5).

....

"(5) Disqualified organizations.--For purposes of paragraph (3) an organization is a disqualified organization if it is--

"(A) described in section 170(b)(1)(A)(i) (relating to churches)."

Supreme Court, U.S.
FILED
DEC 18 1997
CLERK

No. 97-822

In The

Supreme Court of the United States

October Term, 1997

FAIR; FIRST ASSEMBLY OF GOD OF VENTURA, JAMES W. WILLIAMS, III; R.H. SMITH FAMILY PARTNERSHIP; LEAVENS RANCHES; ROBERT TOBIAS; STEPHEN TOBIAS, J.D. McGRATH FARMS; HOWARD AND HOWARD RANCH, DANIEL CAMPBELL, ITO FARMS, THE CONTRERAS FAMILY and HIJI BROS.,

Petitioners,

vs.

CITY OF SAN BUENAVENTURA; and the CITY OF SAN BUENAVENTURA CITY COUNCIL,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT BOEHM*
City Attorney
City of San Buenaventura
501 Poli Street
Ventura, CA 93003
(805) 654-7815

DANIEL P. SELMI
1441 West Olympic Boulevard
Los Angeles, CA 90015
(213) 736-1098

RACHEL B. HOOPER
ROBERT S. PERLMUTTER
SHUTE, MIHALY
& WEINBERGER
396 Hayes Street
San Francisco, CA 94102
(415) 552-7272

Attorneys for Respondents

**Counsel of Record*

72702 (300) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, Inc.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Equal Protection and Due Process Clauses of the United States Constitution prohibit city voters from determining, via an ordinance enacted by initiative, that agricultural lands deserve special protections, unless such voters also apply similar protections to all other categories of land?

II. Whether the Equal Protection and Due Process Clauses of the United States Constitution require a city to extend voting rights to individuals who reside outside city borders, but within the city's "planning area," where state law unambiguously establishes that the city possesses no control over or jurisdiction to actually regulate land uses on these nonresidents' property?

III. Whether a city ordinance's requirement for voter approval of any changes to the city's general plan provisions governing agricultural lands violates the Free Exercise Clause of the United States Constitution simply because a church happens to own a parcel of land subject to that valid and neutral requirement?

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APPENDIX

Appendix 1 — Order Of The Court Of Appeal Of The State Of California For The Second Appellate District, Division Six, Filed October 30, 1996 ..... 1a

Appendix 2 — Order Of The Supreme Court Of California, Filed December 18, 1996 ..... 2a

Respondents City of San Buenaventura and City of San Buenaventura City Council respectfully request that this Court deny the petition for writ of certiorari seeking review of the California Court of Appeal's judgment in this case.

OPINIONS BELOW

In addition to the three opinions set forth in the petition for writ of certiorari, the following two unpublished opinions were issued in this case: (1) the order of the California Court of Appeal, Second Appellate District, Division Six, denying petitioners' request for an extraordinary writ of mandamus that would direct the trial court to overturn its decision, attached hereto as Appendix 1 ("App. 1"); and (2) the opinion of the California Supreme Court denying review of this order, attached hereto as Appendix 2 ("App. 2").

STATEMENT OF THE CASE

Respondents City of San Buenaventura and City of San Buenaventura City Council ("City" or "Ventura") present the following Statement of the Case to supplement that presented by petitioners Farmers, Families & Friends Against Irresponsible Regulations, et al. (collectively "FAIR"). FAIR's statement mischaracterizes the nature, scope, basis for, and effect of Measure I and is replete with legal conclusions cast as factual assertions. FAIR's statement also ignores the central, long-standing role of the initiative process in California's constitutional scheme, the general plan's role in guiding orderly development in California, and two of the state court appellate proceedings that summarily rejected petitioners' claims. What follows is a correction of erroneous statements, a more balanced presentation of Measure I,[1] and a brief description of the initiative and land use planning processes in California.

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1. The provisions of Measure I were enacted as Ordinance 95-33, which is included in the Appellants' Appendix in Lieu of Clerk's Transcript ("AA") at 33-39.

A. Measure I

On November 7, 1995, Ventura voters adopted Measure I through the exercise of the initiative power that Californians reserved to themselves in the State's Constitution. Measure I readopted that portion of the Land Use Plan Map of the City's "General Plan" designating particular land in the City and its planning area as "Agricultural Use."[2] Measure I, § 2, AA at 35-37. Measure I also readopted portions of the General Plan's Land Use Element defining the "Agricultural Use" category, and it amended that definitional provision to ensure the long-term protection of agricultural lands. *Id.*

In addition, Measure I inserted a new section into the Amendment Procedures of the City of Ventura General Plan. This section provides that until December 31, 2030, except under certain specified conditions, the readopted Agricultural Use designations may be amended only if approved by vote of the people. *Id.* However, Agricultural Use lands can be redesignated without a vote of the people if:

> (1) the redesignated land is unsuitable for agricultural use, provided certain conditions are met; or
>
> (2) the redesignation is necessary to avoid an unconstitutional taking of property.

Id. Further, Measure I does not apply to development projects that had received certain preliminary approvals as of the measure's effective date. Measure I, § 4, AA at 38.

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2. California law requires each city to adopt and, as circumstances warrant, periodically review and revise, a comprehensive, long-term general plan for the physical development of the lands within its boundaries and surrounding areas. Cal. Gov. Code §§ 65300, 65358; *see generally DeVita v. County of Napa*, 9 Cal. 4th 763, 788, 889 P.2d 1019, 1035 (1995).

In its statement, FAIR contends that Measure I's "substantive effect is to *prohibit* necessary development and thereby deprive property owners . . . from providing necessary urban facilities such as housing . . . ." Petition for Writ of Certiorari ("Petition") at 3 (emphasis added). FAIR's characterization of Measure I's effect is wholly unfounded.[3] On its face and as a matter of state law, Measure I does not prohibit any development; nor does it impose more restrictive designations on land use than previously existed. Rather, by preserving existing land use categories, it seeks to channel and promote orderly development. Measure I, § I, AA at 34.

Measure I is thus a conservative document. It does not adopt a moratorium on development of urban lands, place a cap on the number of units that can be built, or reduce the areas designated for urban development. Instead, its purpose is to preserve existing agricultural uses within the City and to encourage the County to preserve such uses in those areas outside the City's boundaries that are within its planning area. *Id.* Measure I simply ensures that critical, *pre-existing* plan provisions will be implemented over the long-term and not compromised by a series of individual, "piecemeal" amendments that would undermine protection of agriculture. *Id.* In short, as the California Supreme Court concluded with respect to a virtually identical initiative measure in Napa County, after a full trial and extensive briefing, such measures are

> a reasonable attempt to effectuate the[ ] purposes [of California planning law] by delineating a long-range policy intended to guide the [City's] development, curb haphazard growth, and promote desired land uses.[4]

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3. For the purposes of sustaining a demurrer under California law, courts must reject conclusions born of such pure speculation. *Blank v. Kirwan*, 39 Cal. 3d 311, 318, 703 P.2d 58, 61-62 (1985); *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 827, 134 Cal. Rptr. 839, 841 (1976); Appendix to Petition for Writ of Certiorari ("App.") at A-3, A-9.

4. *See* App. at A-2 (noting that Measure I is patterned after Napa County's Measure J); AA at 218-32 (reprinting full text of Measure J).

DeVita, 9 Cal. 4th at 792, 889 P.2d at 1037. Contrary to FAIR's suggestions, there is nothing radical about such an enactment.

B. Constitutional Reservation of Initiative Power in California

As this Court noted in *James v. Valtierra*, 402 U.S. 137, 141 (1971), "California's entire history demonstrates the repeated use of referendums [and initiatives] to give citizens a voice on questions of public policy."[5] A referendum provision was included in the state's first Constitution, *id.*, and the people of California subsequently reserved the initiative and referendum power to themselves in the 1911 Amendments to the California Constitution. Cal. Const. Art. IV, § 1. This reserved power can be exercised at the local level, "and is generally coextensive with the legislative power of the local governing body." *DeVita*, 9 Cal. 4th at 775, 889 P.2d at 1026; *see* Cal. Const. Art. II, § 11. For over two decades, California courts have consistently upheld the use of initiatives in the land use context. *DeVita*, 9 Cal. 4th at 774-75, 889 P.2d at 1025-26 (citing cases); *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 557 P.2d 473 (1976), *overruling Hurst v. City of Burlingame*, 207 Cal. 134, 277 P. 308 (1929); *see also Hopping v. City of Richmond*, 170 Cal. 605, 150 P. 977 (1915); *In re Phaler*, 150 Cal. 71, 88 P. 270 (1906).

Moreover, California, unlike some other states, prohibits an

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5. In California, the initiative and referendum are distinct procedures used, respectively, to enact legislation in the first instance, or to adopt or reject legislation already enacted by a legislative body. Cal. Const. Art. II, §§ 8(a) & 9; *Rossi v. Brown*, 9 Cal. 4th 688, 695-98, 889 P.2d 557, 560-62 (1995). This Court has used the term "referendum" generally, however, to encompass both types of procedures. *Santa Clara County Local Transportation Auth. v. Guardino*, 11 Cal. 4th 220, 243, 902 P.2d 225, 239 (1995) (observing that in *James* and *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976), "referendum" was used "simply as a label of convenience" for any type of popular vote or plebiscite on a public measure).

initiative from being amended or altered except by vote of the people, unless the initiative itself provides otherwise. Cal. Const. Art. II, § 10(c) (statewide initiatives); Cal. Elec. Code § 9125 (local initiatives); *James*, 402 U.S. at 142; *DeVita*, 9 Cal. 4th at 796, 889 P.2d at 1040. This requirement is necessary to limit the ability of a hostile legislative body to evade or repeal the people's will. *Id.* at 797, 889 P.2d at 1041.

C. The Role of The General Plan Under California Law

California law requires each city and county to adopt a long-term general plan for the physical development of the lands within its boundaries. Cal. Gov't Code § 65300. The general plan must also cover a city's "planning area," which includes

> "any land outside its boundaries which in the planning agency's judgment bears relation to its planning" (Government Code section 65300) . . . . [S]ince certain issues are not confined to political boundaries, the law provides for *planning* outside of the jurisdiction's territory. This is a means by which a local government can formally communicate its concerns for the future of lands *under its neighbors' jurisdictions*.

Governor's Office of Planning and Research, *State General Plan Guidelines* (1990) at 6, AA at 402 (emphasis added).

A city's extraterritorial planning area generally coincides with its "sphere of influence." This "sphere," in turn, depicts the ultimate "probable physical boundaries and service area" of that city, as determined by the county's Local Agency Formation Commission, and facilitates cooperative planning between cities and the county in which they lie. *Id.* at 6-7; Cal. Gov't Code § 56076; *see generally* Peter M. Detwiler, "Annexation and Boundary Issues," 5 *California Environmental Law and Land Use Practice*, § 73.02 at 73-5 (1997) ("Detwiler").

Contrary to FAIR's repeated suggestions, however, such extraterritorial pre-planning, which courts have consistently upheld, has no actual regulatory effect. Rather, a city can actually regulate land uses in an area *only* " 'in the event of subsequent annexation to the city.' " *City of Irvine v. Irvine Citizens Against Overdevelopment*, 25 Cal. App. 4th 868, 877, 30 Cal. Rptr. 2d 797, 801 (1994) (quoting Cal. Gov't Code § 65859); *see also City of Agoura Hills v. Local Agency Formation Comm'n*, 198 Cal. App. 3d 480, 490, 495, 243 Cal. Rptr. 740, 746, 749 (1988) (noting that such areas might never actually be annexed and that "[s]pheres of influence" are merely "flexible planning and study tool[s] to be reviewed and amended periodically as appropriate"); App at A-5. By contrast, within city *boundaries*, the general plan serves as the "constitution" for future development to which all subordinate land use regulations must conform. *DeVita*, 9 Cal. 4th at 773, 889 P.2d at 1024.

In short, under the California Constitution and the State's Planning and Zoning Law, the respective regulatory jurisdictions of cities and counties are entirely separate:

> The *police power* regulation of land use in California is *mutually exclusive*; that is, city limits define whether a city council or a county board of supervisors makes crucial land use decisions. . . . For example, if a county planned and zoned a particular piece of unincorporated property for large-scale agricultural use, and the adjacent city planned and pre-zoned the same property for single-family residential development, then *changing the city's boundary* would lead to changing the basic land use policy for that property.

Detwiler, *supra*, § 73.02, at 73-5 (italics added); *see also* Cal. Const. Art. XI, § 7; Cal. Gov't Code §§ 65100, 65300, 65800, 65850; *Longtin's California Land Use*, § 1.13[5] (2d ed. 1987 and 1997 Supp.). Thus, for land outside City boundaries,

Measure I is simply a planning document; it does not regulate land use at all.

D. Proceedings Below

FAIR's recitation of the proceedings below omits two crucial facts. First, FAIR neglects to mention that — in addition to the trial court's sustaining of the City's demurrer without leave to amend, the Court of Appeal's thorough opinion upholding this decision, and the California Supreme Court's summary denial of review — the Court of Appeal and the California Supreme Court also both summarily rejected FAIR's attempt to overturn the trial court's decision through the extraordinary remedy of mandamus relief. App. 1-1, 2-1; *see also* Petition for Review, No. S057282; Answer to Petition for Review, No. S057282.

Second, FAIR neglects to mention that, in addition to the three causes of action presented in the instant Petition, the Complaint also contained four other, equally meritless claims, one of which directly bears on FAIR's second Question Presented. In that question, FAIR asks this Court to determine that Measure I violates petitioners' voting rights because, they claim, the measure "regulates" land outside the City's boundaries without extending the right to vote to the nonresidents affected by this alleged extraterritorial regulation.

This alleged extraterritorial effect of Measure I, which turns solely on questions of state law, also formed the linchpin of FAIR's unmentioned fourth cause of action. Specifically, FAIR there contended that Measure I's extraterritorial effects violate the California Constitution's limitation on a City's ability to regulate land outside its boundaries. AA at 19-20 (Complaint ¶¶ 49-53). The Court of Appeal emphatically rejected this claim because, under well-established and unambiguous state law, Measure I's designations have no regulatory effect whatsoever on land outside the City's boundaries. App. at A-13 to A-14; *see also* AA at 19-20 (Complaint ¶¶ 49-53); Respondents' Brief on Appeal at 37-42.

Petitioners themselves ultimately abandoned this claim: it was the only one of the seven causes of action that they did not seek review of in their second petition to the California Supreme Court. In short, as a matter of state law, the essential predicate to FAIR's voting rights claim is simply erroneous.

REASONS FOR DENYING THE WRIT

FAIR claims that this case warrants review under Supreme Court Rule 10(c) because, they allege, "[t]his case raises important federal constitutional issues that have not been, but should be, settled by this Court." Petition at 7. What FAIR fails to acknowledge, however, is that this Court has already settled each of the questions raised in the instant Petition. Nor has FAIR pointed to any conflict with relevant decisions of this Court. Indeed, in rejecting FAIR's five attempts to overturn Measure I, the California courts applied well-established precedents of this and other courts. The City urges this Court to do likewise and put a final end to this clearly meritless litigation, which does not conceivably raise any issues meriting review by this Court.

I.

THIS CASE PRESENTS NO ISSUES MERITING SUPREME COURT REVIEW BECAUSE THIS COURT HAS ALREADY ADDRESSED EACH OF THE ISSUES RAISED BY THE PETITION.

A. This Court Expressly Rejected FAIR's Equal Protection and Due Process Claims in *James v. Valtierra* and *City of Eastlake v. Forest City Enterprises*.

In its first Question Presented, FAIR contends that Measure I violates petitioners' equal protection and due process rights because "only owners of agriculturally designated property are forced to go through the initiative process to get their property redesignated." Petition at 8. Petitioners do "not challeng[e] the City's right to zone

property as 'Agricultural Use,' " *id.*, nor do they question either Measure I's findings on the need to protect agriculture or the rationality of the General Plan policies that the initiative readopts and promotes. Instead, they restrict their challenge to the initiative's voter approval requirement, which, they assert, lacks a rational basis. *Id.* at 8, 11. While petitioners purport to argue that this aspect of Measure I is irrational, the necessary implication of their challenge is that either: (1) the Equal Protection and Due Process Clauses prohibit the use of an initiative to readopt certain land use designations unless all such designations are readopted by the same initiative; or (2) California's requirement that legislation enacted by initiative may only be amended by subsequent vote of the people somehow violates these clauses of the United States Constitution.

To state either proposition is to establish its complete lack of merit for review. What makes the instant Petition particularly unwarranted, however, is FAIR's failure even to mention, let alone address, *James v. Valtierra*, 402 U.S. 137 (1971), in which this Court expressly rejected a nearly identical claim.

James upheld a mandatory California voter approval requirement that applied exclusively to low-rent housing projects. The plaintiffs had there argued that the "mandatory nature" of this requirement violated the Equal Protection Clause because

> it hampers persons desiring public housing from achieving their objectives *when no such roadblock faces other groups* seeking to influence other public decisions . . . .

James, 402 U.S. at 142 (emphasis added); *compare* Petition at 11 ("There is no rational basis to single out one class of property owners and require them to expend greater time and resources than any other class of property owners . . . .").

This Court rejected this argument for the simple and obvious reason that,

> [u]nder any such holding, presumably, a State would not be able to require referendums on any subject unless referendums were also required on all *because they would always disadvantage some group.*

James, 402 U.S. at 142 (emphasis added). Accordingly, the Court upheld California voters' ability to impose a mandatory voter approval requirement on a particular classification via a particular initiative. *Id.* at 143. Moreover, the Court recognized that, as a matter of California law, such an initiative could not possibly "single out" that particular classification, because numerous other classifications are already subject to voter requirements.

> [A]n examination of California law reveals that persons advocating low-income housing have *not been singled out* for mandatory referendums while no other group must face such obstacles. Mandatory referendums are required for approval of state constitutional amendments, for the issuance of general obligation long-term bonds by local governments, and for certain municipal territorial annexations. California statute books contain much legislation first enacted by voter initiative, and no such law can be repealed or amended except by referendum. Some California cities have [also] wisely provided that their public parks may not be alienated without mandatory referendums. . . . This procedure for democratic decisionmaking does *not* violate the constitutional command that no State shall deny to any person "the equal protection of the laws.[6]

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6. That the voter approval requirement in *James* was imposed by an initiative amendment to the California Constitution, rather than by statute and local initiative, as here, is irrelevant for purposes of equal protection analysis. In any event, Measure I's voter approval requirement itself reflects the constitutional reservation of the initiative power to the (Cont'd)

Id. at 142-43 (emphasis added) (citations omitted); *see also* Cal. Elec. Code § 9125 (providing that local initiatives, such as Measure I, cannot be repealed or amended "except by the vote of the people unless provision is otherwise made in the original [initiative] ordinance").

Just as in *James* this Court rejected an equal protection argument virtually identical to petitioners' here, so too this Court in *City of Eastlake* expressly rejected the notion that a voter approval requirement for local land use decisions violates substantive due process.

> As a basic instrument of democratic government, the referendum process does not, in itself, violate the Due Process Clause of the Fourteenth Amendment when applied to a rezoning ordinance.

City of Eastlake, 426 U.S. at 679. This is so because "[i]n establishing legislative bodies, the people can reserve to themselves the power to deal directly with matters which might otherwise be assigned to the legislature." *Id.* at 672.

As the Court recognized, this practice is designed to "allow[] the people the *final* decision, amounting to a veto power, over enactments of representative bodies." *Id.* at 673 (emphasis added). This veto power would be meaningless, however, if the legislative body could overturn the voters' determination at its whim, or, as all too frequently happens in the land use context, under pressure from special-interest developers. *See DeVita*, 9 Cal. 4th at 792, 795-97, 889 P.2d at 1037, 1040-41. Thus, far from being irrational

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people. Cal. Const. Art. II, § 11; Art. IV, § 1. Moreover, Measure I's exceptions actually make its voter approval requirement more limited than California Elections Code section 9125 would otherwise require. *See* Measure I, § 4, AA at 38 (allowing the city to redesignate lands without voter approval where the land is unsuitable for agriculture or where necessary to avoid an unconstitutional taking).

or arbitrary, the voter approval requirement is essential. Any local initiative, "to be effective, must limit the power of a hostile city council to evade or repeal the initiative ordinance." *Id.* at 797, 889 P.2d at 1041.

B. This Court Expressly Rejected FAIR's Voting Rights Claims in *Holt Civic Club v. City of Tuscaloosa*.

In its second Question Presented, FAIR alleges that Measure I violates some of its members' voting rights under the Equal Protection and Due Process Clauses. Specifically, FAIR alleges that, through Measure I, the City has denied persons who reside outside the City's borders, but within its planning area, the right to vote on "the designation, redesignation, or change of use of their property. . . ." Petition at 12. FAIR's argument thus rests on the assumption that such persons have a right to vote in City of Ventura elections. Under *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 75 (1978) ("*Holt*"), however, this "assumption . . . [is] erroneous." Such nonresidents have *no* right to vote in City elections. *Id.*

In *Holt*, an Alabama statute allowed cities to regulate, for police and sanitary purposes, an area three miles outside of their borders, but did not extend the right to participate in municipal elections to affected nonresidents. The challenged statutes subjected the residents of Holt — a small, unincorporated area outside the City of Tuscaloosa — to, among other things, the criminal jurisdiction of the city's court and the city's power to license and collect fees from businesses. *Id.* at 61-62. In addition, although not directly in issue, Alabama law subjected such nonresidents to the same pre-planning requirement as the California statute mandating that the City of Ventura pre-plan for extraterritorial areas. *Id.* at 62, n.3 (quoting Ala. Code § 11-52-8 (1975)); *see* Cal. Gov't Code § 65300. As with Ventura in the instant case, however, Tuscaloosa lacked the power actually to impose zoning restrictions on property outside its borders. *Holt*, 439 U.S. at 73, n.8; Cal. Gov't Code § 65859 ("prezoning" does not become effective unless and until territory is actually annexed).

The *Holt* plaintiffs, again like petitioners in the instant case, argued that Alabama's "extraterritorial extension of municipal powers requires concomitant extraterritorial extension of the [voting] franchise . . . ."[7] *Holt*, 439 U.S. at 69. This Court expressly rejected this argument, however, concluding that such nonresidents had no right to vote in city elections. *Id.* at 68-70, 75. Voting rights are implicated, the Court held, only where individuals "physically resident within the geographic boundaries of the governmental entity concerned" are denied participation in that entity's elections. *Id.* at 68. Indeed, the Court explained, "our cases have *uniformly* recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders." *Id.* at 68-69 (emphasis added). Thus, citizens must be *bona fide* residents of a city to vote in that jurisdiction's elections. *Id*; *see also* Cal. Const. Art. II, § 2; Cal. Elec. Code § 10000; *Collier v. Menzel*, 176 Cal. App. 3d 24, 33, 221 Cal. Rptr. 110, 113-14 (1985); Laurence Tribe, *American Constitutional Law* § 13-12, at 1088-89 (2d ed. 1988).

Holt is squarely on point here. As FAIR concedes, the members on whose behalf it brings this claim are not *bona fide* residents of the City of Ventura. Petition at 11. FAIR also concedes that state law requires the City to pre-plan for areas outside its limits and

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7. FAIR contends that, unlike the *Holt* plaintiffs, who allegedly "sought an extension of the voting franchise on an 'equal footing,' " the petitioners here allegedly seek a "much more limited" right to vote. Petition at 13. That contention, however, is multiply flawed. First, this Court placed no weight on the extent of voting rights sought by Holt residents; rather, it rejected altogether "the assumption . . . that they have a right to vote in Tuscaloosa elections." *Holt*, 439 U.S. at 75. Second, FAIR's statement that it seeks only a "much more limited" extension cannot mask the inevitable fact that, at the very least, granting nonresidents "the right to vote [] on those matters which [allegedly] directly impact them," Petition at 13, would necessitate granting them the right to elect and recall City Council members. After all, the City Council was the body that originally designated these nonresidents' land for agricultural use, pursuant to California Government Code section 65300.

that such pre-planning is constitutional.[8] In addition, although petitioners conclusorily assert that Measure I "controls land use of substantial parcels of property outside City's territorial limits," Petition at 14, as a matter of California law, Measure I has no regulatory effect on these lands because they remain under the *exclusive* jurisdiction and control of the County. App. at A-4 to A-7, A-13 to A-14; Cal. Const., Art. XI, § 7; Detwiler, *supra*, § 73.02 at 73-5 ("[C]ity limits define whether a city council or a county board of supervisors makes crucial land use decision.").

Indeed, to the extent that the City's land use designations have any effect at all on nonresidents' lands, it is only because the County of Ventura, through its voluntarily adopted "guidelines," chooses to follow them. *See, e.g., Ventura County Guidelines*, AA at 80 ("Land uses which are allowed by the County without annexation should be equal to or more restrictive than land uses allowed by the City."). Thus, if the County wishes to redesignate petitioners' lands or simply ignore Measure I's designations, "there is nothing in Measure I to prevent it." App. at A-5. The voting rights of FAIR members in unincorporated County lands thus remain fully intact because they may vote in County elections.

Accordingly, as in *Holt*, the "inquiry is limited to the question whether 'any state of facts reasonably may be conceived to justify' " the state's pre-planning requirement. 439 U.S. at 74; *see also id.* at 75 (same inquiry governs Due Process challenge).[9] Measure I and

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8. *See, e.g.*, Appellants' Reply Brief at 19 ("Appellants do not object to preplanning by City outside its boundaries . . . Appellants are not objecting to City's preplanning"); *id.* at 22 ("FAIR reemphasizes that it is not attacking the preplanning requirements of Section 65300.").

9. FAIR's statement that strict scrutiny applies where a city " 'exclud[es] *otherwise qualified voters*,' " Petition at 12 (citing *Collier v. Menzel*, 176 Cal. App. 3d at 33, 221 Cal. Rptr. at 114 (emphasis in original), misses this essential point. Nonresidents are *not* otherwise qualified voters. *Holt*, 439 U.S. at 67-69. Likewise, as discussed below, the Court of Appeal correctly rejected FAIR's other attempts to distinguish *Holt*.

the pre-planning statutes it implements readily survive this test. Just as the

> Alabama Legislature could have decided that municipal corporations should have some measure of control over activities carried on just beyond their "city limit" signs, particularly since today's police jurisdiction may be tomorrow's annexation to the city proper,

id. at 74, so too the California Legislature and the City of Ventura could have decided that the City should pre-plan for these areas to promote orderly development.

C. This Court Has Repeatedly Held That The Free Exercise Clause Does Not Relieve an Individual of the Obligation To Comply With a Valid and Neutral Law of General Applicability Such as Measure I.

In the last of its three Questions Presented for Review, Petitioner First Assembly of God of Ventura ("Church") argues that "a city ordinance that requires a public vote on the use of church land violates the rights of freedom of religion, privacy, equal protection, and due process of law of that church and its members." Petition at i. In other words, the Church contends that, simply because Measure I applies to lands owned by the Church and may require a public vote on those lands, the measure violates the Free Exercise Clause. Like the first two Questions Presented, however, this third question implicates only settled law. In two recent decisions, *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and *City of Boerne v. Flores*, __ U.S. __, 117 S. Ct. 2157 (1997), this Court has rejected the very argument that the Church once again seeks to place before it.

In *Smith*, plaintiffs were dismissed from their employment after using peyote for religious purposes. They argued that the State's

denial of unemployment benefits to them for such "misconduct" violated their Free Exercise rights. The Court emphatically rejected that position, noting that it had never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. Instead, said the Court, its decisions

> have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes or prescribes conduct that his religion prescribed (or proscribed).

494 U.S. at 879. Refusing to hold that a compelling interest is required before such a regulation can be upheld, the Court declared:

> [G]overnment's ability to enforce generally applicable prohibitions of socially harmful conduct . . . "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling . . . contradicts both constitutional tradition and common sense.

Id. at 885.

Petitioner Church argues that Measure I violates its rights under the Free Exercise Clause because it seeks to use its land for church purposes and under Measure I cannot do so until a vote amends the City's General Plan. But this argument merely reiterates, in a different factual context, the same argument made by the plaintiff in *Smith*: that "when otherwise prohibitable conduct is accompanied

by religious convictions, not only the convictions but the conduct itself must be free from government regulations." *Id.* at 882. The Court in *Smith* rejected that argument, and no reason exists for the Court to revisit this settled issue in the present litigation.

Moreover, only last term, in *City of Boerne v. Flores*, __ U.S. __, 117 S. Ct. 2157 (1997), this Court re-affirmed the principles enunciated in *Smith*. In considering the constitutionality of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.*, the Court once more approved the *Smith* holding: that "neutral generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." __ U.S. at __, 117 S. Ct. at 2161. The Court went on to note that the "only instances where a neutral, generally applicable law had failed to pass constitutional muster . . . were cases in which other constitutional protections were at stake." __ U.S. at __, 117 S. Ct. at 2161 (citing *Smith*, 494 U.S. at 881-82). As an example of this narrow exception to the general rule of *Smith*, the *Boerne* decision cited *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, a mandatory school-attendance law was found invalid as applied to Amish parents because it implicated not only the Free Exercise Clause but also the rights of parents to control their children's education. *Boerne*, __ U.S. at __, 117 S. Ct. at 2161.

In a contrived effort to fit itself within this narrow and well-established exception, the Church now claims that Measure I violates its rights to privacy and equal protection.[10] Once again, however, the Church presents no claim of unsettled law that might merit the Court's attention.

The Church argues that Measure I places it "in the intolerable

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10. Petitioners' initial pleading in the California trial court did not even identify the source of the privacy right allegedly violated. In the Court of Appeal, the Church argued that the right stems from California law. Appellants' Opening Brief at 24-27. Before this Court, however, it apparently locates the right in federal law, citing *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986). Petition at 18.

position of being subject to a 'popularity contest'," averring that the result of the vote "depends not on whether a church or school is an appropriate use for its property but rather whether the electorate approves of Church and its teachings." Petition at 18. The California Court of Appeal recognized that this allegation is meritless: "The contention is based on the theory that Measure I puts the Church's religious beliefs to a popular vote. The theory is without foundation." App. at A-10. The vote is on a general plan amendment, as the measure itself plainly indicates:

> All those lands designated as "Agricultural Use" in the City of Ventura Comprehensive Plan "Land Use Map" . . . shall remain so designated . . . unless redesignated to another general plan land use category by vote of the people.

Measure I, § 2; AA at 36.

Before any claim of an invasion of a right to privacy can arise, the plaintiff must have a "reasonable expectation of privacy" in the circumstances. *See, e.g., Sheets v. Salt Lake County*, 45 F.3d 1383, 1388 (10th Cir. 1995). In the present case, the Church is simply a landowner whose property is subject to land use planning, a status that the Church has held since well before the passage of Measure I. It has no reasonable expectation of privacy about the method by which a locality will make land use decisions concerning its property. Accordingly, Measure I in no way infringes on the Church's right to privacy.

In a second attempt to employ the exception in *Boerne* where constitutional protections other than the Free Exercise clause are at issue, the Church also argues that Measure I denies it equal protection. The Church asserts that under federal law, it is "prohibited" from electioneering and must either risk its tax-exempt status by participating in a vote under Measure I or forego the right to mount a vigorous electoral campaign. Petition at 20-21. But not only does this allegation implicate only settled questions under this

Court's Free Exercise jurisprudence, it is once again based on demonstrably false allegations.

The Church is not "prohibited" from electioneering, as it alleges, for federal law does not bar tax-exempt organizations from engaging in political advocacy. The law merely denies tax-exempt status to any non-profit organization that devotes a "substantial part of its activities" toward "attempting to influence legislation," including initiatives. 26 U.S.C. § 501(c)(3); 26 C.F.R. § 1.501(c)(3). Under Measure I, the Church may place a general plan change on the ballot, campaign for it, and retain its tax-exempt status so long as these activities do not become a "substantial" part of the Church's overall activities. Thus, the legal premise for its alleged equal protection violation fails.[11] In any event, the Church has no constitutional right to maintain its tax exempt status.

In sum, because the Church may participate in an initiative campaign, Measure I does not deny it equal protection. *See Christian Gospel Church v. City and County of San Francisco*, 896 F.2d 1221, 1226 (9th Cir. 1990), *cert. denied*, 498 U.S. 999 (1990) (zoning ordinance did not violate equal protection because it did not treat a church differently from other similarly situated landowners). In the present case, the Church stands in the same position as other landowners subject to Measure I, and the measure remains a valid and neutral law of general applicability under the principles enunciated in *Smith* and reaffirmed in *Boerne*.

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11. Indeed, the federal limitation on "attempts to influence legislation" applies equally to the Church's actions that attempt to influence the land use decisions of the Ventura City Council. *See* 26 C.F.R. § 1.501(c)(3)-(c)(3)(ii)(a) (defining "attempting to influence legislation" as "contact[ing] or urg[ing] the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation"). Thus, the Church's tax-exempt status is equally relevant to its appearances before the City Council, and the voting provision of Measure I does not deny the Church equal protection.

II.

THIS CASE PRESENTS NO ISSUES MERITING SUPREME COURT REVIEW BECAUSE THE COURT OF APPEAL PROPERLY REJECTED PETITIONERS' CLAIMS.

A. Measure I's Voter Approval Requirement Is Rational.

1. The Court of Appeal Properly Rejected Petitioners' Claim That It Was Irrational or Arbitrary For City Voters to Readopt the General Plan's Agricultural Use Designations Without Simultaneously Readopting All Other Land Use Classifications.

This Court has long recognized that zoning, planning, and other types of land use regulation, by their nature, treat separate areas of land differently. *See, e.g., Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 387-88 (1926). Where, as here, such classifications do not involve suspect classifications or intrusion on fundamental rights, the rational basis test applies.[12] The Court of Appeal correctly stated and applied this test in determining that a classification scheme survives an equal protection or due process attack unless the challenger alleges facts which, if proved, would demonstrate

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12. Curiously, although petitioners repeatedly acknowledge that the rational basis test governs this claim, Petition at 8-11, the bulk of their first argument disingenuously focuses on two wholly inapplicable strict scrutiny cases, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), and *Hunter v. Erickson*, 393 U.S. 385 (1969), and two equally inapposite Takings Clause cases, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). *See, e.g., Hunter*, 393 U.S. at 389-92 (applying " 'the most rigid scrutiny' " to a challenged city charter provision that used "an explicitly racial classification"); *Moore*, 431 U.S. at 499 (holding that because the city's ordinance on its face intruded on the " 'private realm of family life which the state cannot enter,' " and only for this reason, "the usual judicial deference to the legislature is inappropriate") (citation omitted).

that no "set of facts can be conceived that would sustain" the classification. App. at A-12; *see, e.g., Village of Euclid*, 272 U.S. at 395 (zoning restriction must be upheld unless it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"); *Hodel v. Indiana*, 452 U.S. 314, 331-332 (1981) ("Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights . . . carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality").

Measure I's singling out of agricultural lands for special protection readily survives this test. Indeed, federal and state courts have repeatedly recognized the rational basis for providing special protection for agricultural lands. *See, e.g., Hodel*, 452 U.S. at 331-33 (upholding special protections for "prime farmland"); *DeVita*, 9 Cal. 4th at 791, 889 P.2d at 1037 ("[T]he *particular* need for the long-term protection of *agricultural* land has been recognized both by the Legislature and by this court.") (emphasis added).[13]

Measure I's voter approval requirement simply reflects this particular need and recognizes the particular pressure exerted by developers to redesignate agricultural lands. *See DeVita*, 9 Cal. 4th at 791-92, 889 P.2d at 1037. Given this pressure, the voters could rationally conclude that such a requirement was necessary to thwart attempts by a hostile legislative body to change designations for agricultural lands. *See id.* at 796-99, 889 P.2d at 1040-42 (upholding an identical "freez[ing of] *certain* land use designations") (emphasis added). It is also conceivable, and therefore rational, that the voters

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13. Measure I's findings, which petitioners do not challenge, similarly establish agriculture's uniquely important contribution to Ventura's regional economy, in creating jobs and generating tax revenues, as well as its value as an open space resource. Measure I, § 1(A), (C), & (D), AA at 33. These findings demonstrate that, by reaffirming the land use designations previously imposed by the General Plan, the initiative advances pre-existing policies in the General Plan that recognize the need to protect agricultural and open space lands from urbanization. *See* General Plan at II-9, AA at 237.

determined that there was no need to similarly protect other lands. Thus, as the Court of Appeal correctly concluded, "it is reasonable to single out agricultural land for special treatment that makes it more difficult to change its classification." App. at A-12.

2. Accepting Petitioners' Argument Would Eviscerate California's Longstanding and Constitutionally Based Initiative Power.

As noted above, Measure I's voter approval requirement "merely formalizes" what is provided by California Elections Code section 9125, which states that initiative provisions may not be repealed or amended except by vote of the people. This statutory requirement itself reflects the reservation of the initiative power in California's Constitution. Cal. Const. Art. II, § 11; Art. IV, § 1; *see also* Cal. Const. Art. II, § 10(c) (mandating voter approval for any amendments to a statute enacted by statewide initiative). Given this statutory requirement, the inevitable result of accepting FAIR's argument would mean that the only way California voters could utilize this "basic instrument of democratic government," *City of Eastlake*, 426 U.S. at 679, to readopt any land use designations would be to readopt or establish general plan designations for *all* categories of land. Otherwise, as this Court noted in *James*, the initiative "would always disadvantage some group." 402 U.S. at 142. Petitioners cite no authority or rationale — in California or any other state — for this plainly untenable result, which would eviscerate the initiative power that the California Constitution reserved to the people.

B. The Court of Appeal Properly Determined That Nonresidents Have No Right To Vote in City Elections.

The Court of Appeal properly applied *Holt* and other voting rights cases in determining that members of FAIR who reside outside City borders, but within the City's planning area, have no right to vote in City elections. *See* App. at A-4 to A-8. FAIR contests that court's decision but is unable to find any fault with the court's

reasoning. Instead, FAIR first attempts to distinguish *Holt*, raising numerous red herrings, and then selectively quotes from Ventura County's voluntary guidelines in an apparent effort to show that, notwithstanding the fact that state law grants exclusive jurisdiction over their land uses to the County, Measure I somehow controls the use of their land. As discussed below and in the Court of Appeal's well-reasoned decision, each of these arguments is without merit.

For instance, FAIR conclusorily asserts that Measure I "controls land use" of property outside its jurisdiction, Petition at 14, apparently in an effort to come within the narrow exception that this Court alluded to in a footnote in *Holt*. There, the Court held that nonresidents are entitled to vote in municipal elections *only* in one set of exceptional circumstances:

> a situation in which a city has annexed outlying territory in all but name, and is exercising *precisely the same governmental powers* over residents of surrounding unincorporated territory as it does over those residing within its corporate limits.

Holt, 439 U.S. at 73 n.8 (emphasis added). To come within this exception and thereby state a cause of action for violation of its members' voting rights, FAIR here must allege that the authority exercised by the City of Ventura within its planning area "is no less than that exercised by the city within its corporate limits." *Id.* FAIR however, cannot make such an allegation because, as the Court of Appeal explained, "[u]nlike the statutes upheld in *Holt*, Measure I has no actual regulatory effect in the unincorporated areas of the County." App. at A-7; *see also* Respondents' Brief at 8-16.

FAIR's discussion of its members' "special interest" in elections under Measure I, Petition at 13, is likewise a red herring. In *Holt*, the Court held that, in certain special interest elections, "[b]ona fide residence *alone* [] does not automatically confer the right to vote on all matters . . . ." *Holt*, 439 U.S. at 69 (emphasis

added). That the state "may constitutionally disenfranchise residents who lack the required special interest," *id.*, however, does not remotely suggest that *non*-residents who purport to have a special interest therefore have a constitutional right to vote.

Similarly without merit is FAIR's contention that, in the event their land ultimately is annexed to the City, they will be presented with a *fait accompli*. Petition at 15. The same could be said for the full array of City decisions that would affect petitioners' property and other rights in the hypothetical case that it was ultimately annexed. Nonetheless, petitioners' property is no more controlled by Measure I's pre-planning, than petitioners are currently taxed by City tax assessments that would apply to their land in the event that it is annexed. The County's Guidelines do not — and, under state law, cannot — alter the fact that it is the County that retains regulatory control, any more than a County policy of applying City's tax assessment rates would mean that the City was taxing petitioners. In both cases, petitioners' real dispute is with the County, in whose elections they are entitled to vote.

C. The Court of Appeal Properly Rejected Petitioner Church's Purported Freedom of Religion Claim.

Petitioner Church also alleges that, as applied to it, Measure I violates the First Amendment. The Church constructs its argument on an allegation of its complaint that is so demonstrably erroneous that all lower courts rejected it as a basis for stating a cause of action. The allegation is that because the Church's property is designated agricultural in the City of Ventura's plan, and thus is subject to a Measure I vote, any such vote will pass on the Church's teachings, not on the planning designation for the property. *See* Petition at 15 ("Subjecting a Church's Teaching to a Popular Vote Violates the Church's Rights to Freedom of Religion, Privacy, Equal Protection and Due Process.")

This allegation deliberately misreads the requirements of Measure I. Under that measure's plain and uncontestable language,

the vote is on a land use designation, not on the Church's teachings. The mere fact that a church owns property subject to Measure I does not transform a vote affecting that property into a vote on the Church's teaching. Indeed, under the logic of the Church's argument, *any* land use restriction on Church-owned property, whether imposed by a vote of the people or by the City Council, would impermissibly burden the Church and its teaching, and thus would violate the Free Exercise Clause.

The California Court of Appeal refused to recognize such illogic, holding that state law did not compel it to treat such obviously contrived allegations as true for purposes of demurrer. App. at A-9 ("Unlike allegations of fact, we are not bound on demurrer to treat such conclusions as true. [Citation omitted]. The allegation is belied by the terms of Measure I."). The Church now alleges that "for purposes of a demurrer," the Court of Appeal erred in its approach. Petition at 17. But that question presents only an issue of state procedural law concerning how California courts may construe pleadings, not a reason for this Court to involve itself. The fact remains that the Church asks the Court to grant its petition based on an allegation unquestionably rebutted by the plain language of the legal instrument challenged in the litigation.

Once this utterly fictional characterization of the Measure I vote is discarded, the Church clearly presents no constitutional issue worthy of this Court's attention. The Court's seminal 1990 decision *Employment Division, Department of Human Resources of Oregon v. Smith*, *supra*, set forth the framework for determining whether Measure I violates the Free Exercise Clause. Here, Measure I easily passes that two-part test. First, the measure is neutral in its object. As stated in Section 1 of the measure, its intent is to protect existing agricultural and watershed land. The measure's purpose is thus not the type of invidious purpose needed to support a cause of action for violation of the right to freedom of religion. *Compare Church of the Lukumni Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (the history of an ordinance barring ritual slaughter of animals discloses that its object was to target animal sacrifice by

worshipers). Second, the measure is generally applicable; it applies to all properties that had been designated for "Agricultural Use" in the City's General Plan prior to the measure's adoption.[14]

In short, in *Smith* the Court established the framework for consideration of the Church's Free Exercise challenge. The allegations of the complaint in the instant case present nothing more than a routine application of those settled principles, as all lower courts that reviewed those allegations have concluded.

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14. Petitioner Church argues that a "less restrictive means" than voting is available to the City: it could allow the Church to apply for redesignation of its property to the City Council, rather than the voters. Petition at 18. Under *Smith*, however, the issue is not whether a less restrictive means is available; it is whether the law is neutral and generally applicable. Moreover, as the California Supreme Court observed in its leading 1995 opinion, *DeVita v. Napa County*, *supra*, the purpose of such voting requirements is to ensure that hostile city councils will not thwart the will of the people as expressed through their use of the initiative power. 9 Cal. 4th at 797, 889 P.2d at 1041. The "less restrictive means" advocated by the Church would eviscerate that purpose.

CONCLUSION

For the reasons stated above, the Court should deny FAIR's Petition for a Writ of Certiorari.

Respectfully submitted,

ROBERT BOEHN
Counsel of Record
City Attorney
City of San Buenaventura
501 Poli Street
Ventura, CA 93003
(805) 654-7815

DANIEL P. SELMI
1441 West Olympic Boulevard
Los Angeles, CA 90015
(213) 736-1098

RACHEL B. HOOPER
ROBERT S. PERLMUTTER
SHUTE, MIHALY &
WEINBERGER
396 Hayes Street
San Francisco, CA 94102
(415) 552-7272

Attorneys for Respondents

APPENDIX 1 — ORDER OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE SECOND APPELLATE DISTRICT, DIVISION SIX, FILED OCTOBER 30, 1996

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

B106055
Sup.Ct. No. 162842
(Ventura County)
(Hon. John Hunter, Judge)

FAIR, et al.,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF VENTURA,

Respondent,

CITY OF SAN BUENAVENTURA, etc., et al.,

Real Parties in Interest

ORDER

THE COURT:

We take judicial notice that petitioners have filed a notice of appeal (B105879). We deny the petition. (*Phelan v. Superior Court* (1950) 35 Cal.2d 363, 372; *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 128.)

APPENDIX 2 — ORDER OF THE SUPREME COURT OF CALIFORNIA, FILED DECEMBER 18, 1996

Second Appellate District, Division Six, No. B106055
S057282

IN THE SUPREME COURT OF CALIFORNIA

FAIR Et Al.,

Petitioners

v.

VENTURA SUPERIOR COURT,

Respondent

CITY OF SAN BUENAVENTURA Et Al.,

Real Parties In Interest

Petition for review DENIED.

s/ George
Chief Justice

MOTION FILED

DEC 18 1997

No. 97-822

IN THE

Supreme Court of The United States

October Term, 1997

FAIR; FIRST ASSEMBLY OF GOD OF VENTURA; JAMES W. WILLIAMS, III;R.H. SMITH FAMILY PARTNERSHIP; LEAVENS RANCHES; ROBERT TOBIAS; STEPHEN TOBIAS; J.D. MCGRATH FARMS;HOWARD AND HOWARD RANCH; DANIEL CAMPBELL; ITO FARMS; THE CONTRERAS FAMILY; and HIJI BROS.,

Petitioners,

vs.

CITY OF SAN BUENAVENTURA; and the CITY OF SAN BUENAVENTURA CITY COUNCIL,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT AFTER DENIAL OF REVIEW BY THE CALIFORNIA SUPREME COURT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER FIRST ASSEMBLY OF GOD OF VENTURA

James A. Hayes, Jr.
Counsel of Record
28202 Cabot Road, Suite 100
Laguna Niguel, CA 92677
(714) 347-7900

John W. Whitehead
Steven H. Aden
THE RUTHERFORD INSTITUTE
1445 E. Rio Road
Charlottesville, VA 22901
(804) 978-3888

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

No. 97-822

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Petitioners,

vs.

CITY OF SAN BUENAVENTURA; and the CITY OF SAN BUENAVENTURA CITY COUNCIL,

Respondents,

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Rutherford Institute hereby respectfully moves the Court for leave to file the following brief *amicus curiae* in this case. The consent of counsel for the Petitioners has been obtained. The consent of counsel for the Respondents has been requested but refused.

The interest of the Institute in this case arises from its activity as a non-profit legal services organization representing individuals in cases nationwide in defense of civil and religious liberties, including numerous appearances before this Court.

The Institute is submitting a brief *amicus curiae* on behalf of one of the petitioners, First Assembly of God of Ventura ("Church"). The Church is one of thirteen petitioners in this case, who collectively raise a variety of claims for

infringement of their constitutional rights. The Church, specifically, argues in the petition that its cause of action, alleging that Respondents substantially burdened its free exercise of religion without a compelling interest, should be reinstated in the state trial court and heard on the merits. This argument raises the issue of the viability of the Court's ruling in *Employment Division v. Smith*, 494 U.S. 872 (1990), holding that neutral laws of general applicability that incidentally burden religious free exercise are constitutional. Because of the large number of petitioners and issues to address in the petition, the brief *amicus curiae* which the Institute seeks leave to file contains a more complete argument urging the Court to grant the petition and certify the question of whether *Smith* should be reconsidered and overruled. The viability of *Smith* as precedent has been strongly called into questions by three Justices in *City of Boerne v. Flores*, 117 S.Ct. 2157 (O'Connor, J.; Souter, J.; and Breyer, J., dissenting).

In light of this issue being raised in the petition and the strong interest of several members of the Court, the Institute respectfully requests that its arguments in support of the Church be heard.

Respectfully submitted,

James A. Hayes, Jr.
Counsel of Record
28202 Cabot Road, Suite 100
Laguna Niguel, CA 92677
(714) 347-7900

John W. Whitehead
Steven H. Aden
THE RUTHERFORD INSTITUTE
1445 E. Rio Road
Charlottesville, VA 22901
(804) 978-3888

December 18, 1997

QUESTION PRESENTED

Whether the use of the compelling interest test in the pre-*Employment Division v. Smith ("Smith")* Free Exercise decisions of this Court correctly reflected the historical origins and understanding of the Free Exercise Clause, and thus the First Assembly of God of Ventura ("Church") properly stated a claim against the City of San Buenaventura ("City") by alleging that a popularly-enacted measure, requiring the Church to qualify a ballot initiative and obtain a majority of the voters of the City to approve the use of its property to develop a place of worship, substantially burdens its Free Exercise rights guaranteed by the Fourteenth Amendment to the United States Constitution without a compelling government interest.

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No. 97-822

IN THE

Supreme Court of The United States

October Term, 1997

FAIR; FIRST ASSEMBLY OF GOD OF VENTURA; JAMES W. WILLIAMS, III;R.H. SMITH FAMILY PARTNERSHIP; LEAVENS RANCHES; ROBERT TOBIAS; STEPHEN TOBIAS; J.D. MCGRATH FARMS;HOWARD AND HOWARD RANCH; DANIEL CAMPBELL; ITO FARMS; THE CONTRERAS FAMILY; and HIJI BROS.,

Petitioners,

vs.

CITY OF SAN BUENAVENTURA; and the CITY OF SAN BUENAVENTURA CITY COUNCIL,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT AFTER DENIAL OF REVIEW BY THE CALIFORNIA SUPREME COURT

BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER FIRST ASSEMBLY OF GOD OF VENTURA

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION

The Rutherford Institute is a non-profit organization established in 1982 and based in Charlottesville, Virginia, providing legal services nationwide in defense of civil and religious liberties. The Institute has appeared numerous times before this Court on such matters, most recently as *amicus curiae* to the Archbishop of San Antonio in *City of Boerne v. Flores*, ___ U.S. ___, 117 S.Ct. 2157 (1997), and as counsel of record for Respondent in *Arkansas Educational Television Comm. v. Forbes*, No. 96-779. The Institute believes that the religion issues raised by Petitioners are critical to the

fundamental right to free exercise of religion for all Americans.

Amicus curiae supports one of the petitioners in this matter, First Assembly of God of Ventura ("Church"), and expands on the issue raised more generally (due to length constraints) in Petitioners' brief that Respondent City of Buenaventura has substantially burdened the Church's rights under the United States and California Constitutions to Free Exercise of Religion without a compelling government interest.

This brief urges the Court to take this opportunity to reconsider its holding in *Employment Div. v. Smith*, 494 U.S. 872 (1990), that neutral laws of general applicability do not offend the Free Exercise Clause, and restore the compelling interest test for deciding Free Exercise cases.

Three Justices have strongly expressed their desire to reconsider *Smith* in dissents to the Court's ruling last term in *City of Boerne v. Flores,* 117 S.Ct. at 2185 (Souter, J., dissenting); *Id.* at 2176 (O'Connor, J., dissenting and joined in part by Breyer, J.). Justice Souter renewed his call to reconsider *Smith*, first raised in his lengthy concurring opinion in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 564 (1993)(Souter, J., concurring in part and concurring in the judgment). Justice O'Connor, in a separate dissenting opinion joined by Justice Breyer, further urged the Court to overturn *Smith* outright and return to the compelling interest standard. *Boerne*, 117 S.Ct. at 2176 (O'Connor, J., dissenting). Justice O'Connor examined in detail "the early American tradition of religious free exercise to gain insight into the original understanding of the Free Exercise Clause . . ." and concluded that "[t]he historical evidence casts doubt on the Court's current interpretation of the Free Exercise Clause." *Id.*

All three of the Justices would have directed the parties in *Boerne* to rebrief and reargue the case on the viability of *Smith* as precedent. The correctness of *Smith* was at issue in *Boerne* in order for the Court to pass on the constitutionality

of RFRA's enforcement of the free exercise right. *Id.* at 2186 (Souter, J., dissenting). But the majority did not find it necessary to reconsider *Smith* in order to rule that Congress had exceeded its constitutional powers in enacting the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, et seq., to countermand *Smith*. *Id.* at 2172. Thus, "our free exercise law remains marked by an 'intolerable tension' [cite omitted]. . . ." *Boerne*, 117 S.Ct. at 2186 (Souter, J., dissenting).

In *Lukumi*, Justice Souter observed that the *Smith* test should be reexamined "in the next case that would turn on its application." *Lukumi*, 508 U.S. at 564 (1993)(Souter, J., concurring in part and concurring in the judgment). Justice Souter entreated the Court to reexamine *Smith* because the decision was "decidedly untypical" of the Court's treatment of formally neutral, generally applicable laws in prior free exercise cases but did not overrule those cases. *Id.* The result was "a free-exercise jurisprudence in tension with itself." *Id.*

Both Justice Souter's concurring opinion in *Lukumi* and Justice O'Connor's dissent in *Boerne* rely on the important scholarly inquiry since *Smith* into the roots of free exercise of religion in this country, most notably Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990). Such works were not available to the Court at the time it decided *Smith*[1], and if they had been, the Court may have found the historical justification of its free exercise precedents persuasive and upheld the compelling interest test. *See Lukumi*, 508 U.S. at 574-75 (Souter, J., concurring in part and concurring in the judgment).

This brief will not restate in detail the analyses and the many complex arguments in favor of overturning *Smith* found in that scholarship on free exercise history. To do so would

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[1] See Douglas Laycock, The Supreme Court's Assault on Free Exercise, and the Amicus Brief that was Never Filed, 8 J.L. & Relig. 99, 102 (1990).

needlessly repeat the thorough review given those same works by Justice O'Connor's dissent in *Boerne* and Justice Souter's concurrence in *Lukumi*. The Court is commended to the original scholarship cited for the depth of the arguments which cannot be recreated in the space permitted here. *Amicus curiae* encourages the Court to re-examine *Smith* now in the light of this scholarship and overturn its holding. The history and original understanding of the Free Exercise Clause demonstrate its purpose to protect religious individuals, including the use of exemptions. The compelling interest test effectuates this purpose. This Court's pre-*Smith* opinions thus provide the correct standard for analyzing free exercise cases.

II. RECONSIDERATION OF *SMITH* IS SQUARELY RAISED IN THIS CASE BECAUSE THE CHURCH ALLEGED IN ITS COMPLAINT THAT MEASURE I SUBSTANTIALLY BURDENED ITS RIGHT TO FREE EXERCISE WITHOUT A COMPELLING GOVERNMENT INTEREST, WHICH IS THE PRE-*SMITH* STANDARD FOR DECIDING FREE EXERCISE DISPUTES

If the Court reconsiders and overrules *Smith* here, there will be justiciable issues to be tried on remand of the case to state trial court. The Church alleged in its complaint that its free exercise rights under the Constitution were substantially burdened by Measure I's requirement that it qualify a ballot initiative and obtain a majority vote of the citizens of Ventura in order to develop its land for a place of worship and religious school for its devotees. The state court of appeal sustained the City's demurrer to this cause of action on the ground that "Measure I places no burden on any religious belief." App. A-9.

On reinstatement of its complaint with instructions to the trial court to apply the compelling interest test, the Church will be able to present evidence that Measure I deprives it of its ability to serve its churchgoers by forcing it to submit to the enormous expense and uncertainty of a general popular

vote with no apparent compelling interest to do so. Furthermore, by forcing the Church to engage in a political campaign to use its property, Measure I also imposes on the Church the intolerable burden of losing its tax-exempt status, which requires it to refrain from political activity. Consequently, under Measure I, in order to make use of its property for religious purposes, the Church must risk its tax-exempt status by undertaking the financial drain of seeking the uncertain approval of the general populace in an election.

Of course, a lesser restrictive means of controlling growth in Ventura had always existed prior to Measure I. The City Council was responsible for land-use planning. Although seeking approval from this body entailed some uncertainty and expense, Measure I presents a practical and financial barrier to the Church using its property for the needs of its growing congregation.

Exempting churches from the whims of the majority in the political sector was precisely the original understanding of the Free Exercise Clause, as observed by Justice O'Connor in *Smith*:

> "'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of
>
> worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.'"

Smith, 493 U.S. at 903 (O'Connor, J., concurring, quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1938).

Therefore, reconsideration of *Smith* will restore the compelling interest test and require Respondents to

demonstrate on remand a compelling need to subject the Church to the expense and risk of a general election in order to use its property to build a place of worship.

III. THE PRE-*SMITH* DECISIONS OF THIS COURT IN FREE EXERCISE CASES EMBODY THE HISTORICAL UNDERSTANDING THAT RELIGIOUS PRACTICES ARE PROTECTED FROM THE BURDENSOME EFFECTS OF NEUTRAL LAWS OF GENERAL APPLICABILITY

Smith did not overturn pre-*Smith* precedents. *Lukumi*, 508 U.S. at 573-74 (Souter, J., concurring in part and concurring in the judgment). *Smith* recharacterized the holdings of those cases in an effort to harmonize them with its reasoning. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1120-24 (1990); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that was Never Filed*, 8 J.L. & Relig. 99, 104-06 (1990). Since the *Smith* rule remains fundamentally at odds with those precedents, a genuine issue exists as to which constitutional rule is to be followed. *Lukumi*, 508 U.S. at 574 (Souter, J., concurring in part and concurring in the judgment).

There are other important reasons to reconsider *Smith*. First, the *Smith* rule was decided without briefing and oral argument. *Id.* at 571-72. Rarely, if ever, has the Court decided an issue of such magnitude, not presented by the parties or the facts of the case, without notice and argument. *See generally* Laycock, 8 J.L. & Reg. 99.

Second, and related to the first reason, *Smith* set forth a broader constitutional rule than was necessary to resolve the case. *Id.* at 572-73. Indeed, Justice O'Connor reached the same result as the majority by applying the existing free exercise precedents. *Id.*

Finally, in the course of making its sweeping rule, *Smith* did not inquire into the roots of the free exercise of religion to interpret the original meaning of the Free Exercise Clause. *Id.*

at 574-76. Before *Smith*, little information existed on the history of the Free Exercise Clause in either earlier Supreme Court opinions or in scholarly articles. Legal scholarship developed after *Smith* persuasively demonstrates that the pre-*Smith* compelling interest test is consistent with the original understanding that free exercise of religion was to be protected from the burdensome effects of neutral laws of general applicability. To be sure, scholarly opinion is not unanimous on this point. *See Boerne*, 117 S.Ct. at 2172-76 (Scalia, J., concurring); *see also*, Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992). Nevertheless, even this disagreement underscores the need for the Court to consider the pertinent scholarship now if *Smith*'s vitality as precedent is to be secure.

Prior to *Smith*, the Court's decisions in free exercise cases consistently embodied the concept that the Free Exercise Clause required not only formal neutrality, which would prohibit only those laws whose object is to discriminate against religion, but also substantive neutrality, which would additionally require exempting religious practices from formally neutral laws. *Lukumi*, 508 U.S. at 562-66 (Souter, J., concurring in part and concurring in the judgment). The articulated rule applied in each of those cases was that a compelling government interest must be demonstrated to justify any substantial burden placed by the government on religious practice. There is no doubt that the Court applied heightened scrutiny in those cases. *See, e.g., Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 384-85 (1990); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 829 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987); *Bob Jones University v. United States* 461 U.S. 574, 604 (1983); *United States v. Lee*, 455 U.S. 252, 257-58 (1982); *Thomas v. Review Board*, 450 U.S. 707, 718 (1981); *Yoder v. Wisconsin*, 406 U.S. 205, 215-29 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *Cantwell v. Connecticut*, 310 U.S.

296, 304-07 (1940). *See also Lukumi*, 508 U.S. at 565-66)(Souter, J., concurring in part and concurring in the judgment).

In none of those cases did the Court inquire into the original meaning of the Free Exercise Clause in developing and applying the compelling interest test (nor did it in *Smith*), *Lukumi*, 508 U.S. at 574-75 (Souter, J., concurring in part and concurring in the judgment). Yet, that test emerged from the Court's natural reading of the Free Exercise Clause as a restriction on government's power to burden religious practices, whether by a law's object or by its unintended effect.

Such a reading is consistent with the Court's treatment of other First Amendment rights, frequently affording them exceptions from neutral, generally applicable laws. Laycock, 8 J.L. & Relig. at 103-04 (citing *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982); *NAACP v. Alabama*, 357 U.S. 445 (1958)(political parties and movements exempted from facially neutral disclosure laws); *Hustler v. Falwell*, 458 U.S. 46 (1988)(creating special defenses for media against facially neutral tort law).

It is apparent that a review of the historical origins of the Free Exercise Clause provides considerable support for the compelling interest test which the Court derived from a plain reading of the text. It certainly undermines the remark in *Smith* that the compelling interest test "contradicts both constitutional tradition and common sense." *Smith*, 494 U.S. at 885. Rather, it reveals how fully pre-*Smith* cases embodied the understanding of the framers of the Free Exercise Clause, and how far *Smith*'s rule diverges from it.

Smith is inconsistent with free exercise precedent, which dates from *Sherbert*. Instead of adhering to this precedent, the Court relied on and quoted extensively from *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), without mentioning that this case was essentially overruled in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). *Smith*, 494 U.S. at 879. The Court also quoted from

the three-justice plurality opinion in *Bowen v. Roy*, 476 U.S. 693 (1986), even though that opinion was not followed by five other Justices in separate opinions. *Smith*, 494 U.S. at 883. *Bowen* was later expressly rejected in *Hobbie*, 480 U.S. 141 (1987). Also cited is an older case, *Reynolds v. United States*, 98 U.S. 145 (1879), which upheld a law prohibiting polygamy, practiced then by Mormons, but did so on the reasoning that the Free Exercise Clause protects only beliefs, not conduct. *Id.* at 166-67. But the Court later retreated from that position in *Cantwell*, 310 U.S. at 303-04. Even so, the Court has read *Reynolds*'s elaboration on the evils of polygamy as standing for the compelling interest test. *See, e.g., Sherbert*, 374 U.S. at 403.

In sum, these cases and their subsequent treatment by the Court validate the Court's continued endorsement of the compelling interest test, rather than support *Smith*'s rejection of it. *Lukumi*, 508 U.S. at 569-70 (Souter, J., concurring in part and concurring in the judgment).

Smith's treatment of *Cantwell* and *Yoder*, two cases which unquestionably required exemption of religious practices from neutral laws of general applicability, is also problematic. Rather than apply those cases as pure free exercise precedents, *Smith* instead recharacterizes them as "hybrids," involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents . . . to direct the education of their children." *Smith*, 494 U.S. at 881-82. This hybrid distinction, however, is not supported by either the text or the history of the Free Exercise Clause. Even so, religious freedom was the fundamental issue in both cases, as each was explicit in stating. *Cantwell*, 310 U.S. at 303-07; *Yoder*, 406 U.S. at 201. *Smith*'s attempt, then, at distinguishing *Cantwell* and *Yoder* as "hybrid" cases has instead shown them to be sound free exercise precedent.

Finally, *Smith* tries to reconcile its conclusion with the unemployment compensation cases involving free exercise: *Frazee*, 489 U.S. 829 (1989); *Hobbie*, 480 U.S. 136 (1987);

Thomas, 450 U.S. 707 (1981); and *Sherbert v. Verner*, 374 U.S. 398 (1963). The Court noted that these were the only free exercise cases in which the compelling interest test had been used to invalidate a government action, and had only done so because they involved "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct," *Smith*, 494 U.S. at 883-84, and as such "stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.*

But as Professor McConnell has observed:

> "Difficulty of administration can fairly constitute at least part of the government interest in enforcing the law without exceptions, but it is hard to see why this concern should limit the universe of potential claims. Moreover, if this is the distinction, it is hard to see why the compelling interest test does not apply to many contexts other than just unemployment compensation - indeed to the full universe of claims governed by the due process requirement of 'some kind of hearing.'"

McConnell, 57 U. Chi. L. Rev. at 1123.

Moreover, *Smith*'s distinction of these cases is one without a difference, because most free exercise cases "resemble the unemployment compensation cases in that they involve individuated governmental assessments of the claimant's circumstances." *Id.* (citing *United States v. Lee*, 455 U.S. 252 (1982); *Lyng v. Northwest Indian Cemetary Protective Ass'n*, 485 U.S. 439 (1988); and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) as examples of non-unemployment compensation cases that involved such individuated governmental assessments without the application of the compelling interest test).

Smith, therefore, is unconvincing in its effort to achieve its result without overturning any precedent, by relying on cases of dubious currency (*Gobitis, Bowen* and *Reynolds*), and

by distinguishing established free exercise precedent as either not primarily about free exercise (*Cantwell* and *Yoder*) or as *sui generis* (the unemployment compensation cases).

In fact, these free exercise cases all demonstrate that the compelling interest test was a natural outgrowth of the Court's plain reading of the Free Exercise Clause as requiring exemption from neutral, generally applicable laws - a reading which now acquires added texture from the recent legal scholarship on the historical origins of the Free Exercise Clause.

CONCLUSION

For all of the foregoing reasons, the Court should grant the Petition for Writ of Certiorari and certify the question of whether *Smith* is the proper legal standard for deciding free exercise cases in light of post-*Smith* legal scholarship, which casts serious doubt on *Smith*'s consistency with the original understanding of the Free Exercise Clause and which substantiates the consistency of the compelling interest test with that same understanding.

Respectfully submitted,

James A. Hayes, Jr.
Counsel of Record
28202 Cabot Road, Suite 100
Laguna Niguel, CA 92677
(714) 347-7900

John W. Whitehead
Steven H. Aden
THE RUTHERFORD INSTITUTE
1445 E. Rio Road
Charlottesville, VA 22901
(804) 978-3888

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In The

Supreme Court of the United States

October Term, 1997

FAIR; FIRST ASSEMBLY OF GOD OF VENTURA, JAMES W. WILLIAMS, III; R.H. SMITH FAMILY PARTNERSHIP; LEAVENS RANCHES; ROBERT TOBIAS; STEPHEN TOBIAS; J.D. MCGRATH FARMS; HOWARD AND HOWARD RANCH; DANIEL CAMPBELL; ITO FARMS; THE CONTRERAS FAMILY; and HIJI BROS.,

Petitioners,

v.

CITY OF SAN BUENAVENTURA; and the CITY OF SAN BUENAVENTURA CITY COUNCIL,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District After Denial Of Review By The California Supreme Court

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE PACIFIC JUSTICE INSTITUTE IN SUPPORT OF THE PETITION FOR CERTIORARI

KEVIN E. SMITH
BRUCE C. MCLAUGHLIN
BRAD W. DACUS
* JAMES D. STRUCK
* *Counsel of Record*
Pacific Justice Institute
165A Commerce Circle
Sacramento, CA 95815
Telephone: (916) 646-6232
Attorneys for Amicus Curiae Pacific Justice Institute

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OR CALL COLLECT (402) 342-2831

MOTION OF THE PACIFIC JUSTICE INSTITUTE FOR LEAVE TO FILE BRIEF AMICUS CURIAE FOR THE PETITIONERS

Pursuant to Supreme Court Rule 37.2(b), the Pacific Justice Institute moves for leave to file the attached brief *amicus curiae* in support of the petitioner. Counsel for the petitioners, John H. Findley, has consented to the filing of this brief and that consent has been lodged with the Clerk of this Court. Consent has not been obtained from counsel for the respondents.

INTEREST OF THE AMICUS CURIAE

The Pacific Justice Institute (PJI) is a nonprofit public-interest legal organization formed for the purpose of protecting and promoting the religious freedoms guaranteed by the federal and state constitutions. PJI seeks to represent the interests of individuals who are in danger of having their religious freedoms abridged.

The purpose for this brief is to expound on the last issue advanced in the petition for certiorari: whether a zoning ordinance which prohibits a church from voting in the ballot initiative process used to redesignate its land use is violative of the Free Exercise Clause in conjunction with other hybrid constitutional rights. This *amicus* propounds the view that the ordinance should be evaluated using the strict scrutiny standard of review.

For the foregoing reasons, the Pacific Justice Institute requests that the motion to file the attached brief *amicus curiae* be granted.

DATED: December 18, 1997

Respectfully submitted,

KEVIN E. SMITH
BRUCE C. MCLAUGHLIN
BRAD W. DACUS
* JAMES D. STRUCK
* *Counsel of Record*
165A Commerce Circle
Sacramento, CA 95815
Telephone: (916) 646-6232
Attorneys for Amicus Curiae

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INTEREST

The interest of amicus is set forth in the preceding motion for leave to file this brief.[1]

OPINION BELOW

The opinion of the Court of Appeal of California, Second Appellate District, Division Six, is not reported. It is reproduced in Appendix A of petitioner's Petition for Writ of Certiorari.

INTRODUCTION

The facts of this case as set forth in petitioner's Petition for Writ of Certiorari and herein adopted, raise the issue of whether the strict scrutiny standard applies to judging the constitutionality of an ordinance that prohibits a church from changing its land-use designation except via a ballot initiative process.

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[1] This brief was prepared *pro bono* for the Pacific Justice Institute.

ARGUMENT

I.

MEASURE I, A CITY ZONING ORDINANCE PROHIBITING A CHURCH FROM USING ANY METHOD OF REDESIGNATING ITS LAND USE EXCEPT THE BALLOT INITIATIVE PROCESS, VIOLATES THE FREE EXERCISE CLAUSE OF THE UNITED STATES CONSTITUTION.

This Court has recognized that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts. . . . " *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). This includes the assembling with others for the purpose of worship, which is a central tenet of the Christian faith. *Id.* Implicit, therefore, in the assembling together for the purpose of worship, is the church building itself. Measure I, by subjecting Church to a popular vote, has made Church's free exercise of an essential tenet of its faith subservient to the will of the majority. Yet it is undeniable that the very purpose of the Bill of Rights was to protect the "minority" from what has been termed "the tyranny of the majority." In the words of Justice O'Connor:

> "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . and establish them as legal principles to be applied by the courts." *Id.* at 903 (O'Connor, J., concurring).

The government must remain neutral toward religion. *School District of Abington Tp. v. Schempp*, 374 U.S. 203, 221-22 (1963). But even a regulation neutral on its

face may, in its application nonetheless offend the constitutional requirement for government neutrality if it burdens the free exercise of religion. *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). Therefore, although zoning is normally a valid exercise of the city's police power, when a community zoning plan or practice infringes upon First Amendment rights, its validity must be scrutinized more closely. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 4 (1974). Mere rationality of the plan is insufficient. The plan must be narrowly drawn in furtherance of a substantial government interest. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981). Measure I, moreover, is distinguishable from normal zoning laws because it, unlike most zoning laws, does not provide equal access to change land use designations to one class of individuals. This is the major distinction which runs it afoul of the Free Exercise Clause. Church's land use is subject to a majority vote in an initiative process in which it may not even participate. This is especially burdensome on minority religions.

In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court promulgated a four-step constitutional test for free exercise claims. The church must first show that a conduct burdened is motivated by a sincerely held religious belief. Once the church alleges that the free exercise of its faith has been impeded, the burden of proof shifts to the government which must then show some "compelling state interest" to justify the substantial infringement of the church's First Amendment rights. *Id.* at 406.

If the government is able to demonstrate a compelling interest, it still must prove that no alternative forms of regulation would further the interest without infringing the First Amendment rights. *Id.* at 407. This was

refined by the Court in *Thomas v. Review Board, Indiana Employment Security Division*, 450 U.S. 707 (1981), which stated that the government "may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." *Id.* at 718.

Both courts below failed to apply the proper standard of scrutiny on Measure I and, thereby, denied Church's free exercise claim. The trial court, stating that the ordinance was a valid and neutral law of general applicability applied the standard from *Smith*. The appellate court did not even proceed so far as to misapply the *Smith* case. Rather than delving into the burden placed upon religious rights by the ordinance, it summarily dismissed the free exercise claim as one of pure speculation. Both the federal and state constitutions make it clear that a municipality or county having zoning authority may not exercise its zoning power in a way that prohibits the free exercise of religion. The court, therefore, should have put forth an attempt to evaluate the merits of the ordinance using the strict scrutiny standard.

II.

MEASURE I SHOULD BE ANALYZED USING THE STRICT SCRUTINY STANDARD BECAUSE IT IS NOT A VALID AND NEUTRAL LAW OF GENERAL APPLICABILITY.

In *Smith*, the Court reiterated the consistently held principle that "the right of free exercise does not relieve any individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground

that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' " 494 U.S. at 879, citing *United States v. Lee*, 455 U.S. 252, 263, n. 3 (1982). In applying this rule, the lower court concluded that Church "cannot allege facts sufficient to show a violation of its right to free exercise of religion because Measure I is a 'valid and neutral law of general applicability.' " App. C-3-4. Church contends, however, that the rule established under *Smith* should not be applied to this case, since Measure I is neither "neutral" nor "generally applicable." And, as this Court has recognized:

> "Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

If, therefore, it can be shown that the elements of "neutrality" and "general applicability" are absent in Measure I, this court should apply the test set forth in *Sherbert*.

1.

Measure I is not "neutral"

Although it can be said that Measure I possesses the requisite facial neutrality (in that it does not specifically prohibit religious practice) this court has long recognized that facial neutrality does not end the inquiry:

> "Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality, . . . ' " 508 U.S. 520, 533 (1993); *citing, Gillette v. United States*, 401 U.S. 437, 452 (1971).

The impact of Measure I is far from neutral and significantly burdens religious free exercise by making an essential tenet of Church's doctrine (providing a place of worship for its growing congregation) contingent upon a popular vote of non-members, some of whom are hostile to the teachings of the Christian faith.

Webster defined neutral as "indifferent; having no bias in favor of either side." An American Dictionary of the English Language 22 (1828). Measure I, however, is biased in favor of one of two classes of people (those who live within the city limits and may vote versus those in the unincorporated portion of the county who are not permitted to vote) and is biased in favor of one of two classes of property (parcels not designated as "Agricultural" over those designated "Agricultural Use"). AA 11.

2.

Measure I is not "generally applicable"

Measure I is not "generally applicable," in that it does not apply to any and all, generally, such as the criminal statute which was the subject of *Smith*. In *Smith*, members of the Native American Church had their employment terminated as a result of their sacramental use of peyote. They were denied unemployment benefits

and sued the State of Oregon, claiming that the state's drug law of "general applicability," violated the Free Exercise Clause.

Unlike Measure I, which discriminates against an entire class of individuals, the Oregon drug law did not target the Native American Church, nor did it treat the illegal use of peyote by members of the Native American Church differently than the use by any other persons. Thus, this Court found Oregon's drug law, being both neutral and generally applicable, constitutional:

> "Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents' unemployment compensation when their dismissal results from use of the drug." 494 U.S. at 890.

Another example of "generally applicable" laws, recognized by this court as constitutional despite claims of violation of the Free Exercise Clause, are federal tax laws. Such has been this Court's holding even against "those citizens who believe support of organized government to be sinful." *Id.* at 878. As this Court has recognized: "[T]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *United States v. Lee*, 455 U.S. 252, 260 (1982). In other words, this Court has long recognized that to allow people to divest themselves from the general application of the tax law would create a slippery slope, thus they apply to all without exception.

Measure I, in contrast, presents no neutral and general application. For example, suppose there are two county citizens: "A," who resides within the city limits, and "B," who lives in the unincorporated portion of the county, and both A and B own property designated "Agricultural." Under the dictates of Measure I, A not only possesses the ability to change the designation of his property, he can also vote to prevent B from changing his. B, on the other hand, can do neither, being completely shut out of the political process. By virtue of his residence, B has been made subservient to A. As to B, the law is neither neutral nor generally applicable. Understanding that B is a church and can only change its land designation when those similarly situated to A approve of the change, Measure I forces an infringement upon Church's free exercise of religion. Under these circumstances, this Court has been compelled to require strict scrutiny:

> "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the command of the First Amendment, a law restrictive of religious practice must advance " 'interests of the highest order' " and must be narrowly tailored in pursuit of those interests." 508 U.S. at 546, *quoting, McDaniel v. Paty*, 435 U.S. 618, 628 (1978).

Under such a test, Measure I must fail, since it neither promotes "interests of the highest order," nor is it "narrowly tailored in pursuit of those interests."

III.

MEASURE I SHOULD BE ANALYZED USING THE STRICT SCRUTINY STANDARD BECAUSE IT PLACES A BURDEN ON THE FREE EXERCISE OF RELIGION IN CONJUNCTION WITH BURDENING OTHER CONSTITUTIONAL RIGHTS.

Even if Measure I were determined to be a neutral law of general applicability, strict scrutiny is the proper standard to consider its constitutionality. Church is not trying to exempt itself from all zoning regulations. "But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general application." 406 U.S. at 220. In *Smith*, the Court clearly stated that the First Amendment may bar the application of a neutral, generally applicable law to religiously motivated action when the law burdens the free exercise of religion in conjunction with another constitutionally protected right. 494 U.S. at 881; *see also City of Boerne v. P.F. Flores*, ___ U.S. ___ , 117 S. Ct. 2157, 2161 (1997). As discussed above, the ordinance places an unconstitutional burden on Church's free exercise of religion. Measure I inhibits several hybrid constitutional rights as well.

Cantwell v. Connecticut, 310 U.S. 296, was one of the cases listed in *Smith* as an example of a hybrid claim. 494 U.S. at 881. The unconstitutional licensing system in *Cantwell* required a certificate given by a governmental process which appraised the facts, exercised judgment, and formed an opinion on the authenticity of the plaintiff's

religion. 310 U.S. at 307. This is precisely the effect of Measure I, which gives this same type of arbitrary control to the voting public. "The power to regulate for the protection of society must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Id.* at 304. Measure I places a substantial burden on the hybrid constitutional right of a communicative nature which is Church's inability to vote.

A second cited example of a hybrid right was *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). 494 U.S. at 881. In *Murdock* the Court held that a tax on soliciting books was a prior restraint of speech and religion. 319 U.S. at 114. It was not considered important that the law was "nondiscriminatory" and applied to all solicitors. It was enough that it served to restrain a protection afforded by the First Amendment. *Id.* at 115. Measure I serves to prohibit Church's exercising a constitutional right to vote. Regardless of the fact that other secular entities are also prohibited from voting, higher scrutiny of Measure I is required because this prohibition is in conjunction with a free exercise claim.

Another hybrid right violated by Measure I is the Establishment Clause. The Court has stated that a particular zoning regulation on its face or as applied, may be violative of the Establishment Clause. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 (1982). In *Larkin* the Court invalidated a state statute that delegated liquor license issuance veto power to churches within 500 feet of the business applying for the license. Although the law had a secular purpose, excessive entanglement was present because religious groups became involved in the governmental process. Measure I affects religious practices by

impermissibly entangling the electorate in the affairs of the church. Furthermore, religious groups with land designated as "agricultural" will be completely disfranchised unless they become actively and personally involved in the initiative process.

Additional hybrid rights discussed in the Petitioner's Writ of Certiorari include those of equal protection and due process as guaranteed under the Fourteenth Amendment. Church is not attempting to perform an act that is a concoction of an individual's peculiar religious belief. Church is not attempting to circumvent a neutral and generally applicable criminal law that is intended to ensure public peace or safety. A church building provides shelter and aid and performs the centuries-old tradition of helping those in need. It also provides a forum for people to assemble and practice their religious beliefs. In this manner, Measure I burdens the traditional and conventional practices of almost all religions. There is no need for the Court to determine whether this practice is central to a particular religion because it is a traditional and universally accepted right.

Another constitutionally protected exercise of Church's First Amendment rights is communicating its religious message to the "unchurched" people. The church building serves as a vehicle for this communication. But the people, before they have heard Church's message, may not be amenable to land use redesignation. Therefore, the very people which Church is attempting to reach may be the hostile voting majority who will inhibit the Church's free exercise. Since Measure I does burden the free exercise of religion in conjunction with other constitutional

protections, the standard from *Smith* is inapplicable and this Court should apply the test set forth in *Sherbert*.

CONCLUSION

For all the reasons above the Court should grant certiorari and review the decision of the California Court of Appeal below.

Respectfully submitted,

KEVIN E. SMITH
BRUCE C. MCLAUGHLIN
BRAD W. DACUS
* JAMES D. STRUCK
* *Counsel of Record*
Pacific Justice Institute
165A Commerce Circle
Sacramento, CA 95815
Telephone: (916) 646-6232
Attorneys for Amicus Curiae